DOCKET

(13)

No. 83-1733-CFX
Status: GRANTED

Title: Soler Chrysler-Plymouth, Inc., Petitioner
v.
Mitsubishi Motors Corporation

Docketed:
April 23, 1984

Court: United States Court of Appeals
for the First Circuit

Vide:
83-1569

Counsel for petitioner: Murray,Jerome

Counsel for respondent: Cross,Wayne A.

Entry	Date	Note	Proceedings and Orders
1	Apr 23 1984	G	Petition for writ of certiorari filed.
2	May 10 1984		Brief of respondent Mitsubishi Motors Corp. in opposition filed.
3	May 15 1984		DISTRIBUTED. May 31, 1984
4	Jun 4 1984	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	Jul 27 1984		Brief amicus curiae of United States filed. VIDED.
6	Sep 12 1984		REDISTRIBUTED. October 5, 1984
8	Oct 9 1984		REDISTRIBUTED. October 12, 1984
9	Oct 15 1984		Petition GRANTED. The case is consolidated with 83-1569 and a total of one hour is allotted for oral argument. **********
10	Nov 30 1984		Joint appendix filed. VIDED.
11	Dec 4 1984		Mitsubishi to file in 83-1569 as petitioner on December 17, 1984. Soler Chrysler to file as respondent in
12	Dec 4 1984		83-1569 and cross petitioner in 83-1733 on January 24, 1985.
13	Dec 4 1984		Mitsubishi to file its reply in 83-1569 and as cross respondent in 83-1733 on February 12, 1985.
14	Dec 4 1984		Soler Chrysler to file its reply in 83-1733 on February 26, 1985.
15	Dec 17 1984	G	Motion of International Chamber of Commerce for leave to file a brief as amicus curiae filed.
16	Dec 17 1984		Brief of petitioner Mitsubishi Motors Corp. (Cross Respondent) filed.
17	Dec 15 1984	G	Motion of American Arbitration Association for leave to file a brief as amicus curiae in No. 83-1569 filed.
18	Dec 31 1984	D	Motion of American Arbitration Association for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
19	Dec 31 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jan 7 1985		Motion of International Chamber of Commerce for leave to file a brief as amicus curiae GRANTED.
21	Jan 7 1985		Motion of American Arbitration Association for leave to file a brief as amicus curiae in No. 83-1569 GRANTED.
22	Jan 14 1985		Motion of American Arbitration Association for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. Justice Powell OUT.

No. 83-1733-CFX

Entry	Date	Note	Proceedings and Orders
23	Jan 14 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Powell OUT.
24	Jan 12 1985		Record filed.
25	Jan 24 1985		Brief amicus curiae of Natl. Automobile Dealers Assn. filed. VIDED.
26	Jan 24 1985		Brief of petitioner Soler Chrysler-Plymouth, Inc. filed. VIDED.
27	Jan 24 1985		Brief amicus curiae of Puerto Rico filed. VIDED.
28	Jan 24 1985		Brief amicus curiae of United States supporting respondent in 83-1569 filed.
29	Feb 5 1985		SET FOR ARGUMENT. Monday, March 18, 1985. This case is consolidated with No. 83-1569. (4th case) (1 hr.).
30	Feb 11 1985		CIRCULATED.
31	Feb 12 1985	X	Brief of respondent Mitsubishi Motors Corp. filed. VIDED.
32	Feb 28 1985	X	Reply brief of petitioner Soler Chrysler-Plymouth, Inc. filed. VIDED.
33	Mar 18 1985		ARGUED.

CROSS

PETITION

83 - 1733

NO. 83-

Office - Supreme Court, U.S.
FILED
APR 23 1984
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOLER CHRYSLER-PLYMOUTH, INC.,

Cross-Petitioner,

—against—

MITSUBISHI MOTORS CORPORATION,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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April 20, 1984

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Question Presented

Can a party be compelled to arbitrate a claim based upon a statute designed for that party's protection, when it has not expressly agreed to do so.

Parties

A description of the parties to this action is set forth in the petition for a writ of certiorari filed by Mitsubishi Motors Corporation.[1]

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[1] The stock of Soler-Chrysler Plymouth Inc. is not publicly traded nor is the corporation related to, or affiliated with, any other corporation.

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NO. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOLER CHRYSLER-PLYMOUTH, INC.,

Cross-Petitioner,

—against—

MITSUBISHI MOTORS CORPORATION,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Cross-Petitioner Soler Chrysler-Plymouth Inc. ("Soler") respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the First Circuit, entered on December 20, 1983, as (a) required Soler to arbitrate its counterclaim asserted against Mitsubishi Motors Corporation ("Mitsubishi") pursuant to 15 U.S.C. § 1221 *et seq.*, the federal Dealers' Day in Court Act, and (b) required Soler to arbitrate its counterclaim asserted against Mitsubishi

pursuant to 10 L.P.R.A. § 278 *et seq.*, the Puerto Rico Dealers Act.[2]

Opinions Below

The opinion of the Court of Appeals is reported at 723 F.2d 155 (1si Cir. 1983), and a copy thereof is annexed as Appendix A to the petition for a writ of certiorari filed by Mitsubishi ("Mitsubishi Petition"). The opinion of the District Court for the District of Puerto Rico is annexed as Appendix B to the Mitsubishi Petition.

Jurisdiction

This is a cross-petition filed pursuant to Rule 19.5. The petition for certiorari was docketed in this court on March 22, 1984, and was received by cross-petitioner's counsel on March 23, 1984. This cross-petition is being served not more than 30 days thereafter.

The judgment of the Court of Appeals was entered on December 20, 1983 and a copy of that judgment is annexed as Appendix C to the Mitsubishi Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

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[2] The Court of Appeals reversed the District Court's decision "submitting Soler's Anti-Trust claims" to arbitration. Nevertheless, Mitsubishi has inexplicably taken the position that Soler must arbitrate its claim based upon the Puerto Rico anti-trust statute, 10 L.P.R.A. § 257 *et seq.* Soler disagrees with Mitsubishi's position, but, in order to fully protect its rights, briefly discusses this issue in part II of this cross-petition.

Treaties and Statutes

The statutory provisions involved in this cross petition are 15 U.S.C. § 1222 which is set forth in Appendix A, 10 L.P.R.A. § 278(a) which is set forth in Appendix B and 10 L.P.R.A. § 258 which is set forth in Appendix C.

Counter-Statement of the Case

A. Background.

On October 31, 1979, Soler Chrysler-Plymouth Inc. and Chrysler International, S.A. ("CISA"), a subsidiary of Chrysler Corporation ("Chrysler"), entered into a Distributor Agreement pursuant to which Soler was granted the right to purchase certain automotive products for resale. At the same time, Soler entered into a Sales Procedure Agreement with both CISA and Mitsubishi designed to supplement the Distributor Agreement and to facilitate the sale by Soler of vehicles manufactured by Mitsubishi.

During the model year 1980, which commenced November 1, 1979, Soler, as illustrated by the fact that it sold more than four times the number of vehicles than its predecessor had the previous year, was extremely successful in selling Mitsubishi manufactured vehicles. In so doing, Soler developed a large and profitable market for Mitsubishi vehicles in Puerto Rico.

During the year 1981, however, the market for automobiles in Puerto Rico took a sharp turn for the worse. At this time, Soler, in conjunction with the two other Mitsubishi distributors in Puerto Rico, actively pursued the possibility of transshipping some of the vehicles it had ordered from Mitsubishi outside of Puerto Rico. Mitsu-

bishi and Chrysler, however, repeatedly advised Soler that such transshipment would not be permitted.

In a telex, dated July 31, 1981, Chrysler explained to Soler that the proposed transshipment would violate an agreement Chrysler had entered into with Mitsubishi. The telex, in pertinent part, reads:

> "Market is negotiated directly between the two companies and allocations and subsequent dealer orders are based upon this negotiated volume. There can be no deviation from this agreement and U.S. Dealers could not be permitted by Chrysler Corporation to accept cars diverted from Puerto Rico for resale thru their dealerships."

While the parties continued to disagree as to the propriety of the proposed transshipment, the vehicles remained, unshipped, and unpaid for, in Japan. When it became apparent, however, that Mitsubishi could not be persuaded that its refusal to permit the transshipment of these vehicles was improper, Soler, in a telex dated February 12, 1982[3], disclaimed responsibility for the vehicles. The telex, in pertinent part, also reads:

> "In our letter of August 18 to Mr. Goto replying to his letter of August 12, we gave you information that proved your reasons for prohibiting us from selling cars to the mainland had no basis whatsoever. Your position was, and is, a serious restraint of trade on your part and is against U.S. and Puerto Rico laws."

[3] Also in February 1982, Mitsubishi unveiled its plan to replace Soler and the two other Mitsubishi distributors in Puerto Rico, with its own wholly owned subsidiary. That plan has since been effectuated.

Shortly after receipt of this telex, in an apparent attempt to "beat Soler to the punch" and foreclose Soler from litigating its anti-trust claims, Mitsubishi sought to compel arbitration of this dispute in Japan before the Japan Commercial Arbitration Association.

B. Proceedings before the District Court.

On March 15, 1982 Mitsubishi commenced the within action by filing a complaint seeking to compel Soler to arbitrate certain disputes related to the unshipped vehicles. Thereafter, on May 7, 1982, Soler served an answer and counterclaims on Mitsubishi, and, in addition, joined CISA as a defendant on certain of its counterclaims.[4] Among its counterclaims Soler alleged violations of the Sherman Act, the federal Dealers' Day in Court Act, the Puerto Rico anti-trust statute, and the Puerto Rico Dealers Act.[5]

On May 27, 1982, Mitsubishi filed a supplemental motion seeking an order compelling Soler to arbitrate each of the above counterclaims.

Before the District Court, Soler argued that the refusal on the part of Mitsubishi, Chrysler and CISA to allow the transshipment of the vehicles in question constituted an unlawful territorial restraint of trade which served to void any obligation it may have otherwise had to pay for the vehicles. In addition, Soler contended that its anti-trust counterclaims so permeated Mitsubishi's contract

[4] Soler has since moved for leave to amend its anti-trust counterclaims to join Chrysler as a defendant.

[5] Jurisdiction of Soler's counterclaims was founded on 28 U.S.C. § 1332, 15 U.S.C. § 1222 and 15 U.S.C. §§ 15 and 22.

claims that the District Court should stay arbitration pending resolution of the anti-trust counterclaims in the District Court.

Soler also argued that the arbitration clause in question was a limited one, confined to specifically enumerated articles contained in the Sales Procedure Agreement, and that Soler had never agreed, nor could the arbitration clause be interpretated to read, that it had agreed to arbitrate its statutory claims.

The District Court, however, rejected each of these arguments, and with the exception of a portion of Soler's federal Dealers' Day in Court Act counterclaim,[6] ordered that all of Soler's statutory counterclaims, including its counterclaim under the Sherman Act, be referred to arbitration in Japan.

C. The ruling of the Court of Appeals.

The Court of Appeals reversed the District Court's determination that Soler's anti-trust counterclaims[7] be referred to arbitration and remanded the case to the District Court for a determination of whether the anti-trust counterclaims permeated Mitsubishi's contract related claims.

The Court of Appeals, however, affirmed the District Court's determination that Soler's other statutory counterclaims be referred to arbitration.

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[6]The Court held that the portion of Soler's federal Dealers' Day in Court Act counterclaim which contained allegations that Mitsubishi had acted in bad faith in setting minimum sales volumes was outside the scope of the arbitration clause. The remaining allegations of the counterclaim were referred to arbitration.

[7] See note 2, supra.

Reasons for Granting the Writ

The Court of Appeals, recognizing that Soler had not expressly agreed to arbitrate statutory claims, nevertheless referred these claims to arbitration on grounds that the factual allegations underlying the statutory claims "touched" upon arbitrable provisions of the Sales Procedure Agreement. In so ruling, the Court of Appeals adopted a standard for determining whether a statutory claim should be referred to arbitration which is in direct conflict with the standard adopted by the Ninth Circuit Court of Appeals in *Leyva* v. *Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir.) *cert. denied* 444 U.S. 827 (1979).

Compelling a party to arbitrate a claim based upon a statute designed for that party's protection, may, for all practical purposes, deny that party the protection the statute was designed to afford. *See American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968), where the Court noted the questionable propriety of entrusting the decision of anti-trust issues to commercial arbitrators who are frequently drawn for their business expertise, when it is the business community generally that is regulated by the antitrust laws. This problem is especially significant where, as is the case here, the arbitration is to take place on foreign soil and it can hardly be expected that the public policy objectives of the legislation will be effectuated. *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506 (1974) (Douglas, J., dissenting).

It is thus submitted that before a party can be compelled to arbitrate a statutory claim there must be some positive assurance that the party has agreed to do so. *See Leyva* v. *Certified Grocers of California, Ltd., supra* at 863:

> "We believe that despite the general rule that arbitration clauses should be broadly construed . . . contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provision for such arbitration."

By reason of the proliferation of arbitration clauses in commerical contracts, and the increasing uncertainty as to when statutory claims should be referred to arbitration, it is important for this Court to delineate under what circumstances a party can be said to have agreed to arbitrate a statutory claim. A writ of certiorari to review the decision of the Court of Appeals should, therefore, be issued.

I.

A party should not be compelled to arbitrate a claim based upon a statute designed to protect that party unless it has expressly agreed to do so.

In rejecting cross-petitioner's argument that it had not agreed to arbitrate statutory claims, the Court of Appeals stated:

> "The question is not whether the arbitration clause mentions anti-trust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims . . . are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth Inc.*, 723 F.2d 155, 159 (1st Cir. 1983)

It is submitted that in so ruling, the Court of Appeals misconstrued the scope of the arbitration clause at issue

and failed to recognize the important difference between ordering arbitration of claims based upon a contract and ordering arbitration of claims arising pursuant to a statute.

The arbitration clause in question is a limited one. In contrast to the arbitration clause before this Court in *Southland Corporation* v. *Keating*, —— U.S. ——, 104 S. Ct. 852, 860 (1984), which provided for arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach hereof," the arbitration clause herein is confined to only "Certain Matters," those disputes arising from specifically enumerated articles included in the Sales Procedure Agreement.

The arbitration clause reads:

> VI—ARBITRATION OF CERTAIN MATTERS
> All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I—B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

In addition to Articles I-B through V, which are within the scope of the arbitration clause, the agreement also includes numerous articles not subject to arbitration; i.e. "EFFECTIVE DATE, TERM AND TERMINATION" (Article VII), "CISA RECEIVABLES," (Article VIII), "DISCLAIMER," (Article IX), "BUYER NOT AN AGENT AND NOT AN MMC DISTRIBUTOR" (Article X), "CISA AS PARTY" (Article XI), "STATUS OF DISTRIBUTOR AGREEMENT" (Article XII), "AMENDMENTS" (Article XIII), "APPLICABLE LAW" (Article XIV) and "INABILITY TO PERFORM" (Art-

icle XV). It is thus apparent that the parties did not intend to arbitrate all disputes arising between them, only selected disputes.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court, in refusing to compel arbitration of a claim under Title VII of the Civil Rights Act, made clear that an arbitrator "has authority to resolve only questions of contractual rights." *supra* at 54. This Court also emphasized that there are significant differences between contractual and statutory rights:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. *The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.* And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *supra* at 49 (emphasis added)

Other courts have since recognized this important difference. *See Horne* v. *New England Patriots Football Club*, 489 F.Supp. 465, 470 (D.C. Mass. 1980):

> "Arbitration proceedings are chosen by the parties to vindicate private contractual interests by the application of an arbitrator's specialized competence in the law of the shop. This expertise does not extend to the law of the land, for statutory and constitutional issues must be resolved by the Court."

See also Beckman Instruments v. *Technical Development Corporation*, 433 F.2d 55, 62-63 (7th Cir. 1970):

> "It is evident that the parties did not expressly provide for arbitration of patent validity questions. Moreover, we are in accord with the district court's view that such questions are inappropriate for arbitration proceedings and should be decided by a court of law, given the great public interest in challenging invalid patents."

The same considerations of public policy that were relevant in the above decisions are relevant to Soler's statutory counterclaims herein. The federal Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*, was enacted by Congress to protect automobile dealers from overreaching on the part of more powerful automobile manufacturers. The legislative history of the Act provides:

> "Reasons for Bill
>
> Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers." 3 U.S. Code of Congressional and Administrative News 1956, p. 4596-97.

As the title of the Act suggests, one of the purposes behind the legislation was to assure a dealer the opportunity to secure judicial determination, irrespective of contract terms,[8] as to whether an automobile manufacturer has failed to act in good faith in performing or com-

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[8] The federal Dealers' Day in Court Act was enacted in 1956, subsequent to the enactment of the Federal Arbitration Act.

plying with any provision of its franchise. *Blenke Brothers Co. Inc.* v. *Ford Motor Company,* 217 F.Supp. 459 (D.C. Ind. 1963).

It is submitted that by interpreting the arbitration clause at issue so as to encompass Soler's federal Dealers' Day in Court Act counterclaim the Court of Appeals has undercut the expressed intention of Congress. Similarly, by requiring Soler to arbitrate in Japan, its counterclaim pursuant to the Puerto Rico Dealers Act, 10 L.P.R.A. § 278 *et seq.,* the Court of Appeals, has for all practical purposes, denied Soler the protection the Puerto Rican legislature intended it to have.[9]

Some guidance from this Court is required. The general rule that arbitration clauses are to be broadly construed should not be mechanically applied by courts to deny a party the protection a statute was designed to afford it. A writ of certiorari to review the decision of the Court of Appeals should, therefore, be issued.

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[9] The legislative history of the Act establishes it was enacted to protect dealers, such as Soler, from precisely the kind of actions complained of herein:

> "The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, or without fully eliminating them, such enterprises gradually reduce and impair the extent of their previously established relationships, as soon as these dealers, concessionaires, or agents have created a favorable market and without taking into account their legitimate interest." Statement of Motive of Act No. 75.

I I.

Soler's counterclaim pursuant to the Puerto Rico anti-trust statute should not be arbitrated.

The judgment of the Court of Appeals entered on December 20, 1983 provides:

> "The judgment of the district court submitting Soler's Anti-Trust claims of arbitration is reversed; as to all other issues, the judgment of the district court is affirmed. The case is remanded to the district court for further proceedings in accordance with the opinion of this date. Appellee to receive half its costs."

Soler contends that the reference in the judgment to "Anti-Trust claims" refers to both Soler's Sherman Act counterclaim and its Puerto Rico anti-trust counterclaim. Mitsubishi, however, in its petition for certiorari takes the position that Soler must arbitrate its Puerto Rico anti-trust counterclaim.[10]

It is submitted that if the Court of Appeals intended to differentiate between the two anti-trust statutes it would have done so, and consequently Mitsubishi's position is incorrect. Nevertheless, in order to fully preserve its rights, Soler must briefly discuss this issue.

The Puerto Rico anti-trust statute, 10 L.P.R.A. § 258, is modeled after the Sherman Act, and provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in unreasonable restraint of trade or commerce in the Commonwealth of Puerto Rico or in any section thereof, is hereby

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[10] Mitsubishi has also taken this position before the District Court.

declared to be illegal and every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be guilty of a misdemeanor.—June 25, 1964, No. 77, p. 235, § 2; June 8, 1973, No. 131, p. 525 § 1, eff. June 8, 1973."

By reason of the similarity between the two statutes it would be incongruous to refer one counterclaim to arbitration and require the other counterclaim to be heard in a judicial forum. Not only would there be a real possibility of inconsistent determinations in the two forums, but there would be a danger that an arbitrator's decision on Soler's Puerto Rico anti-trust statute counterclaim might infringe on exclusive federal court anti-trust jurisdiction. In fact, it is this very danger that underlies the doctrine that where anti-trust claims permeate arbitrable claims, arbitration should be stayed pending judicial resolution of the anti-trust claims. *See Big Apple Cookie Company* v. *Springwater Cookie Company,* 517 F.Supp. 367, 368-369 (S.D. Ohio, 1981):

"Underlying the permeation doctrine is the pertinent recognition of the exclusivity of federal court jurisdiction in the determination of antitrust claims. Thus, although an arbitrator's decision directly upon an antitrust claim can have no preclusive effect upon the subsequent assertion of such claim in federal court (*i.e.* because the arbitrator would lack the competent jurisdiction necessary for that form of *res judicata*), there does exist a substantial danger that an arbitrator's decision on non-antitrust claims, within his jurisdiction, might indirectly infringe upon exclusive federal court antitrust jurisdiction by collaterally estopping relitigation of factual issues crucial to both the arbitrable (*i.e.*, non-

antitrust) claims and related antitrust matters. *See generally Overseas Motors, Inc.* v. *Import Motors Ltd., Inc.,* 375 F.Supp. 499, 518-24 (E.D. Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir.), *cert. denied,* 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975). It is this indirect harm to a party's right to have his antitrust claims fully and fairly heard, in the first instance, in the only forum of competent jurisdiction (*i.e.*, federal court), which the permeation doctrine seeks to avoid."

By reason of the foregoing, and for the reasons set forth in Point I of this cross-petition, it is submitted that Soler's counterclaim based upon the Puerto Rico antitrust statute should not be arbitrated.

CONCLUSION

For all of the above reasons, this Court should issue a writ of certiorari, as prayed for herein, to review the opinion and judgment of the United States Court of Appeals for the First Circuit.

April 20, 1984

Respectfully submitted,

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APPENDIX A

Dealers' Day in Court Act (15 U.S.C. § 1222)

§ 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

APPENDIX B

Puerto Rico Dealers' Act (10 L.P.R.A. § 278a)

§ 278a. Termination of relationship

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.—June 24, 1964, No. 75, p. 231, § 2; June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

APPENDIX C

Puerto Rico Anti-Trust Statute (10 L.P.R.A. § 258)

§ 258. Transactions in restraint of trade

Every contract, combination in the form of trust or otherwise, or conspiracy in unreasonable restraint of trade or commerce in the Commonwealth of Puerto Rico or in any section thereof, is hereby declared to be illegal and every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be guilty of a misdeneanor.—June 25, 1964, No. 77, p. 235, § 2; June 8, 1973, No. 131, p. 525, § 1, eff. June 8, 1973.

OPPOSITION

BRIEF

No. 83-1733

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ALEXANDER L. STEVAS,
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–against–

MITSUBISHI MOTORS CORPORATION,
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CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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May 10, 1984

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Questions Presented

1. Whether broad arbitration clauses in international commercial transactions should be narrowly construed to exclude statutory claims solely because the parties did not enumerate specific statutory provisions in their agreements.

2. Whether the Puerto Rico Dealers Act and Puerto Rico Antitrust Law override the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970), *reprinted following* 9 U.S.C. § 201 (Supp. 1983).

The listing required by Rule 28.1 of the Rules of this Court is set forth in cross-respondent's Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit, No. 83-1569.

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No. 83-1733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOLER CHRYSLER-PLYMOUTH, INC.,
Cross-Petitioner,

–against–

MITSUBISHI MOTORS CORPORATION,
Cross-Respondent.

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Respondent Mitsubishi Motors Corporation ("MMC") respectfully requests that this Court deny the cross-petition for a writ of certiorari, filed on April 23, 1984, by cross-petitioner Soler Chrysler-Plymouth, Inc. ("SCP").[1]

[1] MMC respectfully refers the Court to its petition for a writ of certiorari, No. 83-1569, for a discussion of the factual and procedural background relevant to this cross-petition.

Reasons for Denying the Cross-Petition

SCP's cross-petition is premised on the erroneous assumption that SCP and MMC agreed to only a "limited" arbitration clause. Cross-petition at 9. Contrary to SCP's characterization, however, the parties agreed to a classically broad clause providing that:

> "All disputes, controversies or differences which may arise between MMC and BUYER [SCP] *out of or in relation to* Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." (emphasis added).

That clause has already been interpreted both by the District Court and the Court of Appeals as encompassing the subject matter of SCP's counterclaims pursuant to the Dealers' Day In Court Act, 15 U.S.C. § 1221 *et seq.*, the Puerto Rico Dealers Act, 10 L.P.R.A. § 278 *et seq.* and the Puerto Rico Antitrust Law, 10 L.P.R.A. § 257 *et seq.*

Notwithstanding those holdings, SCP now argues that this Court should narrowly construe that broad clause to exclude arbitration of statutory claims solely because the parties did not list the specific statutory provisions in the clause itself.

SCP also appears to argue that the statutory protection intended by the Puerto Rico Dealers Act and the Puerto Rico Antitrust Law overrides the clear mandate of the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

MMC submits that both of these propositions are thoroughly refuted by prior decisions of this Court, and, under Rule 17 of the Rules of this Court, no reason for review by this Court has been presented by the cross-petition.

I.

BROAD ARBITRATION CLAUSES IN INTERNATIONAL TRANSACTIONS SHOULD NOT BE NARROWLY CONSTRUED TO EXCLUDE STATUTORY CLAIMS

SCP's cross-petition seeks to have this Court rule that broad arbitration clauses governing international commercial transactions should be construed so narrowly as to exclude from their scope all statutory claims not expressly referred to by the parties at the time of contracting. The cross-petition should be denied because it is premised upon a proposition which is directly in conflict with long-settled principles established by this Court.

As summarized recently in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ____ U.S. ____, 103 S.Ct. 927 (1983), the rule is that:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . [T]he courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

Id. at ____, 103 S.Ct. at 941-42 (footnote omitted). *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960).

It is equally well settled that an arbitration clause need not refer to a particular statutory claim in order to encompass it. This Term, in *Southland Corp. v. Keating*, ____ U.S. ____, 104 S.Ct. 852 (1984), the Court held:

> "Appellees contend that the arbitration clause, which provides for the arbitration of 'any controversy or claim arising out of or relating to this Agreement or the breach

hereof,' does not cover their claims under the California Franchise Investment Law. We find the language quoted above broad enough to cover such claims."

Id. at ____ n.7, 104 S.Ct. at 860 n.7 (citation omitted). *See Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 339 & n.4 (5th Cir. 1984) (claim under Texas Deceptive Trade Practices—Consumer Protection Act is encompassed by agreement to arbitrate any dispute which "relates to" the contract); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982) (claim under Puerto Rico Dealers Act is covered by agreement to arbitrate "[a]ny dispute related to the interpretation and application of this contract."); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968) (claim under Puerto Rico Dealers Act arbitrable under arbitration clause set forth in contract executed prior to enactment of statute); *Michael v. NAP Consumer Electronics Corp.*, 574 F.Supp. 68 (D. P.R. 1983) (claim under Puerto Rico Dealers Act is covered by agreement to arbitrate "all disputes in connection with the Agreement"). *Cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Here, both the District Court and the Court of Appeals have reached identical conclusions respecting the scope of the arbitration clause at issue. Those conclusions were founded upon well-settled and recently reaffirmed rules of construction. Accordingly, under Rule 17 of the Rules of this Court, there is no reason for this Court to review those holdings.

II.

PUERTO RICO'S LOCAL STATUTES MAY NOT OVERRIDE THE FEDERAL ARBITRATION ACT AND THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Although SCP's cross-petition directly presents only the single question for review discussed above (Cross-petition at i) SCP appears vaguely to suggest that this Court should hold (a) that the judgment of the Court of Appeals, requiring arbitration of SCP's counterclaims, should not be construed to include SCP's claim under the Puerto Rico Antitrust Law and (b) that arbitration of that claim, as well as SCP's claim under the Puerto Rico Dealers Act, is precluded by broader policy concerns. *See* Cross-petition at 12-14.

With respect to SCP's first implicit suggestion, construction of the judgment of the Court of Appeals simply is not an appropriate concern of this Court. SCP's remedy, if any, is a motion addressed to the Court of Appeals. In any event, the judgment of the Court of Appeals is clear on this point. Its opinion states:

> "The principal issue on this appeal is whether arbitration of *federal* antitrust claims may be compelled. . .".

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 157 (1st Cir. 1983) (emphasis added). Its opinion does not contain the slightest discussion or hint of any issue of non-arbitrability with respect to SCP's claim under the Puerto Rico Antitrust Law. *See* 723 F.2d at 161.

SCP's second implicit request for review seeks to have this Court overrule its recent decision in *Southland Corp. v. Keating*, in which the Court held:

> "In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . .
>
> "We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law."

____ U.S. at ____, 104 S.Ct. at 858 (footnote omitted). *Accord, Moses H. Cone Memorial Hospital, supra,* ____ U.S. at ____, 103 S.Ct. at 941 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.*" (emphasis added)).

SCP's suggestion that claims arising under the Puerto Rico Antitrust Law and the Puerto Rico Dealers Act are non-arbitrable is, therefore, directly at odds with *Southland* and

Moses H. Cone Memorial Hospital, both of which make it clear that the supposed policy of non-arbitrability implicit in Puerto Rico's local law has been pre-empted by Congress. *See also Commerce Park at DFW Freeport v. Mardian Construction Co., supra*, 729 F.2d at 339-340; *Michael v. NAP Consumer Electronics Corp., supra* (Federal Arbitration Act pre-empts Puerto Rico Dealers Act).

Conclusion

For all the reasons stated above, this Court should deny the cross-petition for a writ of certiorari.

May 10, 1984

Respectfully submitted,

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OPPOSITION

BRIEF

No. 83-1733

Office - Supreme Court, U.S
FILED
MAY 10 1984
ALEXANDER L. STEVAS,
CLERK

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As summarized recently in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ___ U.S. ___, 103 S.Ct. 927 (1983), the rule is that:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . [T]he courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

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Here, both the District Court and the Court of Appeals have reached identical conclusions respecting the scope of the arbitration clause at issue. Those conclusions were founded upon well-settled and recently reaffirmed rules of construction. Accordingly, under Rule 17 of the Rules of this Court, there is no reason for this Court to review those holdings.

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SCP's second implicit request for review seeks to have this Court overrule its recent decision in *Southland Corp. v. Keating*, in which the Court held:

> "In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . .
>
> "We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law."

____ U.S. at ____, 104 S.Ct. at 858 (footnote omitted). *Accord, Moses H. Cone Memorial Hospital, supra*, ____ U.S. at ____, 103 S.Ct. at 941 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary.*" (emphasis added)).

SCP's suggestion that claims arising under the Puerto Rico Antitrust Law and the Puerto Rico Dealers Act are non-arbitrable is, therefore, directly at odds with *Southland* and

appeals. Indeed, five courts of appeals are in agreement with the court below on the first question raised by the Petition in No. 83-1569. The second question raised by that petition involves an issue of first impression. See Pet. App. A14. Accordingly, review by this Court of the questions presented by the Petition in No. 83-1569 is not warranted.[5]

1. Mitsubishi contends first (Pet. 7-13) that the doctrine of *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), "raises significant and recurring problems concerning the scope of the Federal Arbitration Act [9 U.S.C. 1 *et seq.*]" (Pet. 7). In *American Safety* the Second Circuit held in the context of a domestic dispute that a predispute agreement to arbitrate was void with respect to antitrust claims. In support of its holding the Second Circuit noted in particular the importance of the

[5]The United States presented its position on arbitrability of Soler's federal antitrust counterclaim at substantial length in its amicus brief filed in the court of appeals (C.A. No. 82-1913). For the Court's convenience, we are lodging a copy of that brief with the Clerk of the Court.

In the court of appeals the United States expressed no views on the issues presented by Soler's Cross-Petition (No. 83-1733) or on the merits of the underlying substantive claims in this litigation. This brief likewise does not address those matters. We note, however, that the question presented by the Cross-Petition appears in large part to involve the court of appeals' interpretation of the scope of the arbitration clause in the Sales Procedure Agreement and the court's reading of Soler's counterclaims. These issues are specific to this case and do not constitute matters of sufficient general significance to warrant review in the absence of a conflict among the circuits. The Cross-Petition (at 7) alleges a conflict with a "standard" adopted by the Ninth Circuit in *Leyva* v. *Certified Grocers of California, Ltd.*, 593 F.2d 857, cert. denied, 444 U.S. 827 (1979). The decision in *Leyva*, however, rested primarily on interpretation of an arbitration clause of a collective bargaining agreement, worded differently from the clause at issue here; moreover, the statutory claim in *Leyva* was based on the Fair Labor Standards Act, not on the federal Dealers' Day in Court Act or the other (Puerto Rican) statutes on which Soler relies. In sum, the Cross-Petition does not appear to satisfy any of the criteria for review set forth in Sup. Ct. R. 17.

antitrust laws in assuring a competitive marketplace, the complexity of the issues and evidence involved in many antitrust cases, and the fact that arbitrators are normally chosen from the business community the antitrust laws are intended to regulate. 391 F.2d at 826-827. Mitsubishi acknowledges (Pet. 9) that at least four other courts of appeals,[6] as well as the court below in this case, have followed *American Safety*, but contends that that decision nevertheless is inconsistent with the Federal Arbitration Act.

We note initially that Mitsubishi did not raise this contention in the court of appeals.[7] Absent exceptional circumstances that do not appear to be present in this case, this Court will not review an argument that was not raised in the courts below. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). In any event, Mitsubishi's contention is without merit.

The holding of the Second Circuit in *American Safety* rests on well-established principles. The antitrust laws are not designed for the protection of individual competitors; rather, their function is to preserve competition and ensure the proper operation of the free enterprise system. See *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320

[6]See *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068, 1070 (8th Cir.), cert. denied, 404 U.S. 872 (1971); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980, 983-984 (9th Cir. 1970).

[7]In the court of appeals Mitsubishi did not contest the correctness of *American Safety* and its progeny in the context of a domestic dispute. It contended only that the holding of *American Safety* should not be applied to an international business transaction. Mitsubishi C.A. Br. 30, 32, 34.

(1962); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958). Antitrust violations can result in injury to millions of consumers. See *American Safety Equipment Corp.*, 391 F.2d at 826-827. As this Court has noted, plaintiffs who enforce the antitrust laws through treble damages actions act as "private attorneys general," serving not only their own interests but also the interests of the public. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972). In providing for private antitrust actions under the original Sherman Act (see 15 U.S.C. 15), Congress recognized that the resources of government enforcement agencies are limited and that private suits could constitute a significant enforcement tool. Of course, it is true that the Federal Arbitration Act reflects "a national policy favoring arbitration." *Southland Corp.* v. *Keating*, No. 82-500 (Jan. 23, 1984), slip op. 7.[8] But in view of the highly important role private actions play in the scheme of federal antitrust enforcement, it is most unlikely that Congress would have intended to allow parties to a private contract to preclude such actions by means of general arbitration clauses. See *American Safety Equipment Corp.*, 391 F.2d at 827; cf. *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930).[9]

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[8]Mitsubishi quotes from this Court's opinion in *Southland Corp.* v. *Keating* at several points. See Pet. 8, 11-12. *Southland Corp.* does not concern the arbitrability of federal antitrust claims; rather, it holds that the Federal Arbitration Act preempts contrary state law. The Court expressly distinguished the latter question from the question whether Congress itself had created an exception to the federal arbitration statute. See slip op. 13 n.11.

[9]As the Second Circuit noted in *American Safety*, since antitrust claims often involve firms that singly or by agreement possess monopoly power, "contracts of adhesion between alleged monopolists and their customers should [not] determine the forum for trying antitrust violations." 391 F.2d at 827. The other factors noted by the court in *American Safety* — complexity of the issues and evidence in antitrust cases and the fact that arbitrators normally are drawn from the business

2. Mitsubishi also contends (Pet. 13-17) that in concluding that Soler's antitrust counterclaim is nonarbitrable, the court of appeals failed to enforce the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970) (hereinafter cited as Convention).[10] That contention is unpersuasive.

We agree that courts generally should be hospitable to international arbitration agreements and should avoid restrictive interpretations that would undermine the purposes of the Convention and the United States' accession to it. However, the Convention itself provides that signatories need not recognize and enforce all arbitration agreements. Article II(3) of the Convention states that a court "shall" refer a matter to arbitration unless it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed." The court of appeals expressly acknowledged this provision and, in keeping with its own precedent, noted that the provision is to be construed hospitably to arbitration (Pet. App. A20). The court recognized, however, that Article II(3) must be read in a broader context. By

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community — reinforce the conclusion that Congress did not intend antitrust claims to be arbitrable.

Petitioner suggests (Pet. 9-10) that the only exceptions to the coverage of the Federal Arbitration Act are those expressly mentioned in the text of the Act or in other statutes. That suggestion disregards *Wilko* v. *Swan*, 346 U.S. 427 (1953), in which this Court held that the federal arbitration statute must yield to the provisions for district court enforcement in the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, despite the fact that the latter statute does not mention arbitration or the arbitration statute.

Mitsubishi cites various decisions involving the relationship between the Federal Arbitration Act, on the one hand, and the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, or the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, on the other (Pet. 10-11). Those decisions, which do not concern claims under the antitrust laws, do not illuminate the issue in this case.

[10]The text of the Convention is reprinted at Pet. App. F1-F7.

its own terms, Article II(3) applies to agreements "within the meaning of this article." Article II(1) requires recognition only of those agreements that concern "a subject matter capable of settlement by arbitration." Article V(2)(a) provides that a country that is a party to the Convention may decline to enforce an arbitral award if the "subject matter of the difference is not capable of settlement by arbitration under the law of that country."[11] Thus, the plain sense of the text of the Convention is that neither an arbitration agreement nor an arbitral award is entitled to recognition and enforcement under the Convention unless the subject matter of the dispute is capable of settlement by arbitration under the law of the country where recognition or enforcement is sought.

The legislative history of the United States' accession to the Convention confirms this understanding of the text. When the President presented the Convention to the Senate, it was accompanied by an explanatory memorandum from the State Department.[12] The memorandum assured that accession to the Convention would still permit the United States to avoid referral to arbitration of those matters it viewed as nonarbitrable. The memorandum stated expressly that the limitation of referral to matters capable of settlement by arbitration under Article II(1) was "necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration." S. Exec. Doc. E, 90th Cong., 2d

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[11]In addition, under Article V(2)(b), a court may refuse enforcement of an arbitral award if the "recognition or enforcement of the award would be contrary to the public policy" of the country where enforcement is sought.

[12]Such memoranda are entitled to great weight in the interpretation of treaties. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

Sess. 19 (1968). As an example, the memorandum noted (*ibid.*) that in some states of the United States disputes concerning title to real property are nonarbitrable.

As the court of appeals pointed out (Pet. App. A21 n.10), courts of other countries have interpreted the Convention not to require arbitration of matters that are nonarbitrable under the law of that country. Commentators, too, have concluded that Article II(1) of the Convention permits a court to decline to enforce arbitration agreements or awards if arbitration would be inconsistent with the law of the country in which the court is located.[13]

There can be little doubt that antitrust is one of that limited class of subjects that are not "capable of settlement by arbitration" within the meaning of Article II(1). As the court of appeals observed (Pet. App. A20), it has been the uniform law in the United States for more than a decade and a half that domestic antitrust claims are not arbitrable.[14] That rule rests largely on fundamental policy judgments about the broad public importance of the antitrust

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[13]In addition to the sources mentioned in the court of appeals' opinion (Pet. App. A21-A22), we note the following comment:

> The non-arbitrability of a subject matter reflects a special national interest in judicial, rather than arbitrable [*sic*], resolution of dispute. Classic examples of non-arbitrable subject matters are anti-trust, the validity of intellectual property rights (patents, trademarks, etc.), family law and the protection of certain weaker parties. The various subject matters differ, however, from country to country.

A. van den Berg, *The New York Arbitration Convention of 1958*, at 369 (1981) (footnotes omitted).

[14]The rule that antitrust claims are "inappropriate for arbitration" was articulated two years before the United States' accession to the Convention in 1970. *American Safety Equipment Corp.*, 391 F.2d at 828; *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710, 715-716 (9th Cir. 1968). See also *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223 (1968) (antitrust claims under New York law are not arbitrable).

laws and the significance of private treble damages actions for the enforcement of those laws. See pages 5-6, *supra*. Those policy judgments "lose no pertinence or weight in an international context" (Pet. App. A20). Contrary to Mitsubishi's characterization (Pet. 17), antitrust principles do not constitute some mere "parochial" doctrine. The strength of the United States' adherence to its antitrust laws is known on a worldwide basis, and antitrust principles are highly valued by some of our most important trading partners. See Pet. App. A17.[15]

3. Mitsubishi errs in contending (Pet. 16-17) that the decision below conflicts with this Court's decision in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Scherk* the Court held that an arbitration clause in a contract between a United States company and a German citizen for the sale of European trademarks was enforceable under the Federal Arbitration Act and that the lower courts had erred in refusing to dismiss or stay the United States company's district court action for damages for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). The Court declined to extend the holding of *Wilko* v. *Swan*, 346 U.S. 427 (1953) (see page 7 note 9, *supra*) to this international dispute for three reasons. First, the provision for arbitration in *Scherk* contained a choice of law clause that solved a problem, especially vexatious in the context of international contracts, of what substantive law should apply to the dispute. Second, a "parochial" refusal by courts of one country to grant arbitration would "invite

[15]Cf. *Parsons & Whittemore Overseas Co.* v. *Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (suggesting that under Article V(2)(a) of the Convention, a court sitting in the United States might be expected to decline to enforce an award involving arbitration of an antitrust claim); *Societe Nationale pour la Recherche* v. *General Tire & Rubber Co.*, 430 F. Supp. 1332, 1334 (S.D.N.Y. 1977).

unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." Finally, whatever advantage in choice of courts and venue the securities laws might give a plaintiff in a domestic dispute could well be "chimerical," since a foreign party might obtain a foreign court order nullifying the advantage. 417 U.S. at 516-518.

Scherk did not involve the antitrust laws; and the concerns that motivated the Court in *Scherk* lack force in the context of this case. First, since the parties' agreement in this case dealt with the sale of vehicles shipped into Puerto Rico, it should have been clear that the Sherman Act would apply to alleged anticompetitive restraints on the sale of those vehicles. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) (Congress intended the antitrust laws to extend to the utmost extent of its power to regulate interstate and foreign commerce).[16] Second, the concern of the United States with the fundamental principles embodied in the antitrust laws is not the sort of parochialism the Court disapproved in *Scherk*. Here the Convention itself (which the Court did not purport to apply in *Scherk*, cf. 417 U.S. at 520-521 n.15) recognizes that certain issues are so important to national interests that contracting states will declare them nonarbitrable and will insist that they continue to be resolved by the courts. The antitrust laws of the United States reflect just such a fundamental

[16]For purposes of the Sherman Act, Puerto Rico is treated as a state of the United States, not a territory. See *Cordova & Simonpietri Insurance Agency, Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36, 38-44 (1st Cir. 1981).

In contrast to the agreement involved here, the contract in *Scherk* had only a minimal relationship to the United States. See *Scherk*, 417 U.S. at 515 ("the subject matter of the contract concerned the sale of business enterprises * * * primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets").

national policy.[17] Finally, because the many nations that have adopted the Convention have done so in the knowledge that there are certain issues other contracting states may consider nonarbitrable, the United States' insistence on the nonarbitrability of antitrust claims seems unlikely to result in either surprise or recrimination on the part of other parties to the Convention.

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[17]Of course, the securities laws at issue in *Scherk* are of substantial importance. As the court of appeals noted (Pet. App. A26), however, there is a significant difference between the securities laws and the antitrust laws. The securities laws were enacted in large part to protect investors. See *United States* v. *Naftalin*, 441 U.S. 768, 774-777 (1979). By contrast, the antitrust laws exist to protect competition itself, which is the very mainspring of the United States economy. See page 5, *supra*. This difference is reflected in the fact that Congress has provided that antitrust plaintiffs may recover treble damages, but has provided only for recovery of actual damages by securities plaintiffs.

CONCLUSION

The petition for a writ of certiorari in No. 83-1569 should be denied.[18]

Respectfully submitted.

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JULY 1984

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[18]As we have stated (note 5, *supra*), the Cross-Petition (No. 83-1733) does not appear to present any question warranting this Court's review.

DOJ-1984-07

JOINT

APPENDIX

(13) (12)

Nos. 83-1569 and 83-1733

Office-Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,

Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,

Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 19, 1984
CROSS-PETITION FOR CERTIORARI FILED APRIL 20, 1984
CERTIORARI GRANTED OCTOBER 15, 1984

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Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

82 Civ. 0538

MITSUBISHI MOTORS CORPORATION,
Plaintiff and Defendant on Counterclaim,

v.

SOLER CHRYSLER-PLYMOUTH, INC.,
Defendant and Plaintiff on Counterclaim.

v.

CHRYSLER INTERNATIONAL, S.A.,
Additional Defendant on Counterclaim.

Date	*NR*	*Proceedings*
1982		
March 15	1	Motion for preliminary injunction, with affidavit in support thereof, and memorandum in support thereof, filed.
March 17	5	ORDER that the request for temporary restraining order is denied. Defendant is hereby ordered to appear before this Court on April 30, 1982 at 9:30 A.M. and show cause why a preliminary injunction should not

Date	*NR*	*Proceedings*
		be issued granting the arbitration requested. Plaintiff will notify defendant with copy of complaint and attachments and copy of this order forthwith, and file with the Clerk of the Court a certification to that effect, filed and entered (GG).
April 30	12	Case called for order to show cause, etc. Statements of parties heard. Parties granted 15 days to file memorandum. Defendant granted 15 days thereafter to respond. (J. Gierbolini.)
May 7	13	Defendant and plaintiff on counterclaim Soler Chrysler-Plymouth, Inc.'s motion to stay and preliminary injunction filed.
May 7	14	Affidavit of Benjamin Rodriguez-Ramon in support of motion to stay, filed.
May 7	15	ANSWER and COUNTERCLAIMS of defendant & plaintiff Soler Chrysler-Plymouth, Inc., filed.
May 11	16	Defendant-plaintiff Soler Chrysler-Plymouth's supplemental motion to motion for stay and preliminary injunction, filed.
May 14	18	ORDER that upon consideration of defendant's motions for stay and preliminary injunction same is granted;

Date	*NR*	*Proceedings*
		plaintiff is enjoined from taking any further action to compel defendant Soler Chrysler to submit to arbitration in Japan pending a determination of this Court of the issue of arbitration (GG).
May 18	19	Summons on Chrysler International returned and filed, executed through Michael O'Mara on May 14, 1982.
May 27	20	Supplemental Motion for Stay Pending Arbitration with affidavit of Robert L. Sills, in support thereof, by Mitsubishi Motors.
July 12	32	Motion to Dismiss and for Summary Judgment with memorandum in support thereof, and exhibits with proof of service of documents upon attorney Rodriguez-Ramon, etc., by plaintiff.
July 12	33	Affidavit of Mitsuaki Mitsukuri.
October 29	49	Special Appearance seeking extension of 30 days to answer counterclaims, by Chrysler International.
November 22	56	OPINION AND ORDER (GG) that plaintiff's request for arbitration be and is hereby granted and consequently, MMC and SCP are hereby ordered to arbitrate the issues contained in the first claim for relief of the complaint. As to counterclaim,

Date	*NR*	*Proceedings*
		it is further ordered that counterclaims 1, 2, 3, 5, the first three claims in numbers 7, 8 and 9 shall be submitted to arbitration and consequently are hereby dismissed as to MMC. This case will follow its normal course as to claims 4, 6 and the remaining claims in counterclaim 7 and as to all counterclaims regarding CISA. The Clerk shall enter final judgment accordingly (E.O.D. 11-23-82).
November 24	57	JUDGMENT that plaintiff's request for arbitration be granted, counterclaims 1, 2, 3, 5, the first three claims in number 7, i.e. Mitsubishi Motors refusal to ship vehicles, failure to timely reimburse for warranty and for rebates, 8 and 9 shall be submitted to arbitration and consequently, the same are hereby dismissed, as to Mitsubishi Motors (Clerk).
December 3	58	NOTICE OF APPEAL, by Soler Chrysler-Plymouth from judgment entered on November 24, 1982.
December 3	59	Application for stay of judgment pending appeal, by Soler Chrysler.
December 3	60	Notice of appearance on behalf of Chrysler International, by Fiddler, et al. and further request 15 days to file responsive allegations 12-9-82.

Date	*NR*	*Proceedings*
December 14	62	STATEMENT OF ISSUES ON APPEAL, by defendant-appellant and plaintiff-appellant on counterclaim.
December 16	63	Stipulation by Mitsubishi and Soler Chrysler requesting a 2-week extension to file opposition to SCP's request for a stay of the judgment pending appeal.
December 21	64	ANSWER by Chrysler International, S.A.
1983		
March 23	71	ORDER (CCA 3-14) denying motion for stay pending appeal and advancing case to April list; Court will hear argument on April 4 and remaining briefs should be timely filed.
1984		
January 17	72	JUDGMENT from CCA dated December 20, 1983 reversing the judgment of District Court as to claims of arbitration, but as to all other issues the judgment of the District Court is affirmed. Case is remanded to the District Court for further proceedings in accordance with the Opinion of this date. Appellee to receive one half of its costs. cc: Gierbolini, Alfaro, Masini, Staff Attorney, Appeals Clerk.
January 31	73	Motior requesting hearing for oral arguments on permeation, by defendant and plaintiff on counterclaim.

Date	*NR*	*Proceedings*
January 31	74	Motion for leave to amend averments on counterclaims. Answer and amended counterclaims tendered by defendant and plaintiff on counterclaims.
February 27	77	Motion for stay of arbitration, by defendant Soler Chrysler-Plymouth, Inc.
March 27	91	ANSWER AND AMENDED COUNTER-CLAIMS, by defendant and plaintiff.
March 28	92	MINUTES (HL) of oral hearing re: permeation. Statements heard. Court states it *will hold ruling on motion to stay and motion to amend complaint.* As to the motion requesting entry of default, the same is denied. Court will be ruling soon on today's arguments.
May 29	96	ORDER (HL 5-25) *staying determination of claims pending arbitration in Japan.* (E.O.D. 5-30).

Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 82-1913

Date	*Proceedings*
1982	
12-14	Copy of notice of appeal and district court docket entries received and filed and case docketed. Notices mailed.
1983	
2-24	Order to show cause with temporary restraining order, received and filed. Brief in support of application for temporary restraining order and stay of judgment pending appeal, received and filed.
2-25	ORDER: (Campbell, J.) appellee is directed to respond to appellant's motion for stay by March 7, 1983. Such response shall include comments upon three certain questions listed in said order. Notices mailed.
3-14	ORDER: (Campbell, J.) denying the motion for stay pending appeal; advancing the case to the April list; the court will hear oral argument on April 4, 1983, and the remaining briefs should be timely filed. Notices mailed.
4-4	Heard by Campbell, Ch.J., Coffin & Bownes, JJ.
9-6	Brief for the United States as *amicus curiae,* received and filed.

Date	*Proceedings*
12-20	JUDGMENT: The judgment of the district court submitting Soler's Antitrust claims to arbitration is reversed; as to all other issues, the judgment of the district court is affirmed. The case is remanded to the district court for further proceedings in accordance with the opinion of this date. Appellee to receive half its costs. Opinion of the Court, by Coffin, J. Notices mailed.
1984	
10-18	Order of Supreme Court granting certiorari (83-1569) October 15, 1984. Order of Supreme Court granting certiorari (83-1733) October 15, 1984.

Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Civil No. 82-0538

MITSUBISHI MOTORS CORPORATION,

Plaintiff,

vs.

SOLER CHRYSLER-PLYMOUTH, INC.,

Defendant.

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW, plaintiff Mitsubishi Motors Corporation ("MMC"), by its undersigned attorneys, and respectfully states, alleges and prays as follows:

1. This is an action to compel arbitration to recover damages for breach of certain contracts between MMC and defendant Soler Chrysler-Plymouth, Inc. ("SCP"). MMC also seeks declaratory and injunctive relief in that arbitration with respect to the termination of SCP's purported rights to act as a distributor of MMC products.

The Parties

2. MMC is a corporation organized and existing under the laws of Japan, with its principal place of business in Tokyo, Japan. MMC is a diversified manufacturer of motor vehicles.

3. SCP is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

Jurisdiction and Venue

4. There is a complete diversity of citizenship between plaintiff and defendants herein. The amount in controversy, exclusive of interest and costs, exceeds $10,000. This Court accordingly has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1332.

5. This action arises under the laws of the United States, in particular the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 9 U.S.C. 201 *et seq.* This Court accordingly has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331 and 1337 and 9 U.S.C. 4 and 203.

6. Venue within this District is proper under 28 U.S.C. 1391(b).

FIRST CLAIM FOR RELIEF

7. SCP is engaged in the sale and distribution in certain areas of Puerto Rico of passenger cars and trucks manufactured or distributed by Chrysler Corporation ("Chrysler") which products are distributed by Chrysler's wholly-owned subsidiary, Chrysler International, S. A. ("CISA"), through a network of independent distributors and dealers, pursuant to the terms of a written distributorship contract between CISA and SCP dated October 31, 1979 (the "Distribution Contract"). A copy of the Distribution Contract is annexed hereto as Exhibit "A", and made a part hereof as if fully set forth herein.

8. Among the products distributed by SCP are certain motor vehicles manufactured by MMC bearing Chrysler and MMC trademarks ("MMC Products").

9. The MMC Products sold by SCP are subject to the terms and conditions of a Sales Procedure Agreement among MMC, CISA and SCP dated October 31, 1979 (the "Sales Procedure Agreement"). A copy of the Sales Procedure Agreement is annexed hereto as Exhibit "B", and made a part hereof as if fully set forth herein.

Failure to Pay for Ordered Vehicles

10. Pursuant to Paragraph I(B) of the Sales Procedure Agreement, SCP has ordered 966 vehicles, at a total f.o.b. price of $3,526,168, but has failed to pay therefor pursuant to Paragraph I(F). Such vehicles were manufactured at the special instance and request of SCP to the specifications and requirements of SCP.

11. By reason of the foregoing, SCP is indebted to MMC in the amount of $3,526,168, together with interest thereon.

Failure to Pay Distress Unit Penalties

12. Among the terms and conditions set forth in Paragraph I(E) of the Sales Procedure Agreement is the following:

> "If shipment of ordered Motor Vehicles is not made within one month from the end of the month in which MMC produced such Motor Vehicles due to any reason which is not imputable to MMC, BUYER shall pay MMC a distress unit penalty to compensate MMC for storage costs and interest charges incurred by MMC for keeping such Motor Vehicles in stock in accordance with the Ordering Procedure in effect on the date of such production."

13. Pursuant to the Sales Procedure Agreement, SCP has ordered 966 MMC vehicles which remained unshipped for periods of one month or more. SCP has thereby incurred, as of February 28, 1982, $290,012.58 in distress unit penalties, no part of which has been paid.

14. By reason of the foregoing, SCP is indebted to MMC in the sum of $290,012.58, together with interest thereon.

Damage to MMC's Warranties and Goodwill

15. Paragraph 1(I) of the Sales Procedure Agreement provides, in part:

> "No conditions, representations or warranties, express or implied by law, are made or will be deemed to be made by MMC in respect of Products sold hereunder, except for those provided for in the Service Policy and Warranty Procedure Manual previously delivered to BUYER or any amended or substituted manual adopted by MMC (hereinafter referred to as the Service Policy and Warranty Procedure Manual) in effect on the date of shipment of such Products. . . .
>
> "BUYER shall extend to its Dealers a warranty substantially similar to the warranty extended to it by MMC and cause such Dealers to extend such warranty to retail purchasers of Motor Vehicles. . . ."

16. SCP has defaulted in its obligations with respect to such warranties. In particular, SCP has failed to provide adequate after-sale warranty service to purchasers of MMC vehicles. Such failures have endangered, and continue to endanger, the good will of MMC and the name, reputation and standing of MMC.

17. As a consequence of the foregoing, MMC has been damaged, and SCP is liable therefor.

Failure to Obtain Financing

18. Paragraph I(F) of the Sales Procedure Agreement provides as follows:

> "Payment for Products to MMC by BUYER shall be made, unless otherwise agreed upon, by irrevocable, confirmed, without recourse, unrestricted and at sight letters of credit to be opened in favour of MMC through reputable first class banks acceptable to MMC. Such letters of credit shall be valid for at least 120 days after they are opened and shall be opened within 15 days after BUYER's receipt of MMC's acceptance as provided in paragraph D(2) of this Article or by such other earlier date as may be required by MMC. BUYER shall notify MMC promptly of the opening of such letters of credit. If BUYER fails to provide such letters of credit, MMC shall have the option of reselling the contracted goods for BUYER's account, holding the goods for BUYER's account and risk and/or cancelling the Export Sales Contract relating to such goods and claiming for damages caused by BUYER's default."

19. On information and belief, at various times in the past 12 months, SCP has been unable to obtain letters of credit in accordance with the terms of Paragraph I(F). Further on information and belief, SCP will not be able in the future to obtain such letters of credit.

20. By reason of the foregoing, MMC is entitled to a declaratory judgment: (a) that SCP has breached the Sales Procedure Agreement; and (b) that SCP would not be able to perform under the Sales Procedure Agreement.

Expiration of Sales Procedure Agreement

21. On or about October 31, 1981, the Distribution Contract expired by its terms, and has not been renewed.

Accordingly, the Sales Procedure Agreement expired on by its terms on October 31, 1981.

22. On or about February 22, 1982, SCP orally surrendered its rights, if any, under the Sales Procedure Agreement.

23. A controversy has arisen between MMC and SCP. MMC contends: (i) that SCP is not and never has been a dealer of MMC within the meaning of the Puerto Rico Dealer's Act, 10 L.P.R.A. 278 *et seq.* ("Act 75"); (ii) that MMC has been discharged from its obligations under the Sales Procedure Agreement under reason of the matters and transactions set forth above; (iii) that the non-renewal of SCP's rights under the Sales Procedure Agreement was in accordance with the terms thereof; and (iv) that SCP's rights under the Sales Procedure Agreement were terminated or not renewed with just cause, and that Act 75 has been complied with. SCP contends: (i) that it now is or formerly was a dealer of MMC; (ii) that it has fulfilled the terms and conditions of the Distribution Contract and the Sales Procedure Agreement; and (iii) that MMC is therefore liable for the alleged impairment of SCP's rights under Act 75. This controversy is actual and justiciable.

Arbitration Agreement

24. Paragraph VI of the Sales Procedure Agreement provides as follows:

> "All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

25. Each and every one of the claims and demands set forth above in paragraphs 1 through 23 hereof is within the scope of the above-described agreement to arbitrate.

26. MMC desires to arbitrate all disputes, controversies and differences with SCP, and has instituted this action to obtain, *inter alia,* such relief.

27. SCP has failed or neglected to arbitrate its disputes, controversies and differences with MMC pursuant to the terms and conditions of the Sales Procedure Agreement, and has threatened to commence litigation in respect thereto. Accordingly, pursuant to 9 U.S.C. 4 and 201, MMC is entitled to an order compelling SCP to proceed to arbitration as provided in the Sales Procedure Agreement.

SECOND CLAIM FOR RELIEF

28. Plaintiff incorporates herein by reference the averments of paragraphs 1 through 27 hereof as if fully set forth herein.

29. Despite its agreement to arbitrate, SCP has repeatedly threatened to commence one or more civil actions against MMC arising out of or relating to the Sales Procedure Agreement, the Distribution Contract or SCP's purported rights as a distributor or dealer of MMC products.

30. Any such claim would be either: (a) a defense on counterclaim in the arbitration demanded in the First Claim for Relief herein; or (b) a compulsory counterclaim herein.

31. If SCP were to institute such litigation against MMC, MMC would be irreparably harmed. MMC has no adequate remedy at law.

32. Accordingly, pursuant to the terms of 9 U.S.C. 3, 28 U.S.C. 1651 and 2283, and in order to protect its

jurisdiction and effectuate its judgments, this Court should preliminarily and permanently enjoin SCP from commencing or prosecuting against MMC any other action arising out of or related to the Sales Procedure Agreement, the Distribution Contract, or SCP's purported rights as a present or former distributor or dealer of MMC products.

WHEREFORE, plaintiff MMC demands judgment, as follows:

(a) On its first claim for relief, ordering arbitration between MMC and SCP in accordance with the terms of the Sales Procedure Agreement;

(b) On its second claim for relief, preliminarily and permanently enjoining SCP from instituting or prosecuting against MMC any other action arising out of or related to the Sales Procedure Agreement, the Distribution Contract, or SCP's purported rights as a distributor or dealer of MMC Products;

(c) For the costs and disbursements of this action, including MMC's reasonable attorneys' fees; and

(d) Granting MMC such other and further relief as to the Court seems just and proper.

In San Juan, Puerto Rico, this 15th day of March, 1982.

McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA
G. P. O. Box 4225
San Juan, Puerto Rico 00936
Telephone No. 753-3000

By: /s/ SAMUEL T. CESPEDES
Samuel T. Cespedes

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, New York 10111
Telephone No. (212) 841-5700

By: /s/ ROBERT L. SILLS
Robert L. Sills

Exhibit A to the Complaint

CHRYSLER INTERNATIONAL S.A.

DISTRIBUTOR AGREEMENT AUTOMOTIVE PRODUCTS

This Agreement is made by and between CHRYSLER INTERNATIONAL S.A., a corporation organized and existing under the laws of the Swiss Confederation with its principal office in Geneva, Switzerland (hereinafter sometimes called CHRYSLER), and SOLER CHRYSLER-PLYMOUTH INC., a corporation organized and existing under the laws of PUERTO RICO with its principal place of business at CARRETERA NO. 2 KM 6.8., PUEBLO VIEJO GUAYNABO PUERTO RICO, 00657 and its principal office at CARRETERA NO. 2 KM 6.8., PUEBLO VIEJO GUAYNABO PUERTO RICO, 00657 (hereinafter sometimes called DISTRIBUTOR), and will govern the sale by CHRYSLER to DISTRIBUTOR of PLYMOUTH PASSENGER CARS AND CAR DERIVATIVES MANUFACTURED BY MITSUBISHI MOTORS CORPORATION OF TOKYO, JAPAN and automotive replacement parts and accessories (said motor vehicles, replacement parts and accessories hereinafter sometimes called Products).

1. PURCHASE RIGHTS

Subject to the provisions of this Agreement, CHRYSLER grants to DISTRIBUTOR the non-exclusive right to purchase Products from CHRYSLER, and DISTRIBUTOR agrees to buy Products from CHRYSLER, for resale within the following described territory (hereinafter called Sales Area): METROPOLITAN SAN JUAN, PUERTO RICO;

INCLUDING THE PRESENT TERRITORIAL JURISDICTION OF THE MUNICIPALITIES OF SAN JUAN, BAYAMON, CAROLINA, GUAYNABO, CATANO, TOA BAJA, TRUJILLO ALTO AND RIO PIEDRAS, HATILLO, ARECIBO, BARCELONETA, DORADO, FLORIDA, MANATI, VEGA ALTA, VEGA BAJA, TOA ALTA, CANOVANAS, LOIZA, RIO GRANDE.

2. DISTRIBUTOR'S CAPITAL STOCK OR OWNERSHIP INTEREST

If DISTRIBUTOR is a corporation, partnership or limited liability company, DISTRIBUTOR represents and agrees (and it is upon this express representation that CHRYSLER has entered into this Agreement), that the persons named below own beneficially, and will continue to own beneficially (except for transfers not effecting a change in majority control or interest), unless CHRYSLER otherwise agrees in writing, the capital stock or other ownership interest of DISTRIBUTOR in the percentages indicated below:

NAME	TITLE	VOTING STOCK
JOAQUIN SOLER SR.	CHAIRMAN	50%
JOAQUIN SOLER JR.	PRESIDENT	50%

3. DISTRIBUTOR'S MANAGEMENT

CHRYSLER's entry into this Agreement is conditioned upon the active, substantial and continuing personal participation in the management of DISTRIBUTOR's organization by:

NAME	POSITION
JOAQUIN SOLER JR.	PRESIDENT
A. SOLER	MANAGER

4. SALES PROMOTION

(a) SELLING—DISTRIBUTOR will energetically promote and develop the sale of Products throughout the Sales Area described in Paragraph 1 of this Agreement. DISTRIBUTOR further undertakes and agrees that DISTRIBUTOR's authorized Dealers (which term includes DISTRIBUTOR's facilities) will sell in such Sales Area that number of new Products, including current model motor vehicles, as will constitute a full development and exploitation of the market potential for Products and obtain for CHRYSLER for each trademark lines of Products set forth in Paragraph 1 of this Agreement a fair share of the total motor vehicle sales in the Sales Area. Whether or not DISTRIBUTOR has fulfilled DISTRIBUTOR's undertakings in such Sales Area pursuant to this Paragraph 4 will be determined by reference to such reasonable criteria as CHRYSLER may from time to time establish. CHRYSLER agrees that such reasonable criteria will be based on the best and most accurate information available to CHRYSLER.

DISTRIBUTOR will use DISTRIBUTOR's best efforts to establish Dealers at such locations as may be reasonably required, under terms and provisions consistent with this Agreement, and DISTRIBUTOR agrees to train, instruct and supervise each such Dealer as may be required to fulfill DISTRIBUTOR's undertakings.

(b) OPERATIONS—DISTRIBUTOR agrees to employ and maintain the number of competent office employees and

sales, service and other business fieldmen necessary to enable DISTRIBUTOR to carry out successfully all its undertaking and obligations hereunder.

DISTRIBUTOR agrees to cause its Dealers to provide and maintain during the term of their respective agreements with DISTRIBUTOR, sufficient capital, financing, stocks of Products, proper tools and signs, office facilities, showrooms, parts and service facilities and other related facilities, and adequate and competent new and used car sales, service, parts and general management personnel to adequately represent and service Products in that portion of the Sales Area assigned them by DISTRIBUTOR.

DISTRIBUTOR shall from time to time give to DISTRIBUTOR's Dealers all directives and suggestions that may be necessary for the proper performance by such Dealers of the duties and obligations assumed by them under their agreements with DISTRIBUTOR. DISTRIBUTOR will give due consideration to all reasonable directives and suggestions relating to Products business that may be given to DISTRIBUTOR by CHRYSLER from time to time. DISTRIBUTOR acknowledges the importance of, and agrees to review with and explain thoroughly, to each of DISTRIBUTOR's Dealers each and every term and provision of its agreement with such Dealers and DISTRIBUTOR will ensure that each such Dealer complies with all of its duties and obligations resulting from its agreement with DISTRIBUTOR.

(c) SERVICE—DISTRIBUTOR will employ, in accordance with the volume of DISTRIBUTOR's business, competent mechanics, office employees and technical fieldmen sufficient in number and maintain such stock and assortment of CHRYSLER-approved automotive replacement parts and accessories as may be required to assure prompt and satis-

factory service for all owners of Products who may request such service from any Dealer, such mechanics and technical fieldmen to be made available by DISTRIBUTOR for training at CHRYSLER's request. DISTRIBUTOR will ensure that each of its Dealers will install, equip and maintain service facilities and employ adequate service personnel, in accordance with the foregoing. DISTRIBUTOR will also ensure that DISTRIBUTOR's own technical personnel and those of its Dealers will be thoroughly trained in the ser ing and repair of Products and thereafter currently a thoroughly instructed about all new directives from CHRY. LER relative to such servicing and repair.

(d) FACILITIES AND CAPITAL—DISTRIBUTOR agrees to maintain at DISTRIBUTOR's principal place of business or at such other or additional locations as may be agreed upon, office facilities, new car storage, service, parts and accessories and training facilities, and used car premises adequate to fulfill all of DISTRIBUTOR's undertakings and obligations hereunder and to operate such place of business in the manner and during the hours usual in the trade in DISTRIBUTOR's Sales Area.

CHRYSLER and DISTRIBUTOR will determine from time to time, when appropriate, the amount of net working capital and net worth necessary for DISTRIBUTOR successfully to carry out DISTRIBUTOR's undertakings in this Agreement and DISTRIBUTOR agrees to maintain such net working capital and net worth in the business.

(e) DEALER IDENTIFICATION PROGRAM—DISTRIBUTOR agrees to participate in the Chrysler Dealer Identification Program, as may be offered from time to time by CHRYSLER, to identify the Dealer Premises and operations fully and in a manner consistent with the world-wide Chrysler Dealer Identification System and Standards.

5. ADVERTISING

DISTRIBUTOR agrees to advertise throughout the Sales Area in such a manner and to such extent as will obtain for Products a fair share of the motor vehicle market in the Sales Area and as well develop confidence in DISTRIBUTOR and its Dealers as well as in Products and service therefor. DISTRIBUTOR will not use, or cause or allow any of its Dealers or any other person or firm controlled by DISTRIBUTOR to use, any advertising tending to injure the reputation of CHRYSLER or deceive the public; and DISTRIBUTOR agrees to discontinue immediately, and to cause its Dealers and all persons and firms controlled by DISTRIBUTOR to discontinue immediately any advertising that CHRYSLER finds to be injurious to its reputation or likely to deceive the public.

6. REPORTS AND RECORDS

DISTRIBUTOR will submit to CHRYSLER for confidential use complete and accurate reports of its and its Dealer's sales and stocks of new and used passenger cars and commercial vehicles, and other sales reports, on such forms and at such times as CHRYSLER reasonably may request.

DISTRIBUTOR shall submit monthly financial reports and operating statements, monthly parts sales and stock reports, monthly used car reports, and monthly open parts reports and other business management reports, on such forms and at such times as CHRYSLER reasonably may request. DISTRIBUTOR agrees to use and keep accurate and current at all times a uniform accounting system acceptable to CHRYSLER which will enable CHRYSLER to develop comparative information, in order, among other things, to provide business management assistance to distributors for their benefit.

DISTRIBUTOR agrees that CHRYSLER may for confidential use inspect DISTRIBUTOR's books and records for the purpose of determining whether they are kept in such manner that data shown in them can be used in CHRYSLER's business management assistance to distributors and for the purpose of verifying any invoices or other claims DISTRIBUTOR may render to CHRYSLER. All such records pertaining to claims by DISTRIBUTOR against CHRYSLER shall be retained by DISTRIBUTOR for a period of at least two years. DISTRIBUTOR agrees to insert a similar provision in its agreements with its Dealers.

7. ORDERS

CHRYSLER agrees to ship or cause to be shipped Products to DISTRIBUTOR only on DISTRIBUTOR's order. DISTRIBUTOR agrees to submit to CHRYSLER current orders for Products and estimates of DISTRIBUTOR's future Products requirements on forms CHRYSLER reasonably may request for the mutual benefit of distributors and CHRYSLER. All orders are subject to acceptance or rejection by CHRYSLER in whole or in part. CHRYSLER will use its best efforts to fill accepted orders for Products; however, all orders are accepted subject to delays or changes occurring in manufacture or shipment. CHRYSLER will not be liable for delays in delivery or for non-delivery, nor will anything in this Agreement obligate CHRYSLER to deliver to DISTRIBUTOR any particular number, type or assortment of Products.

8. CHANGE OR DISCONTINUANCE OF MODELS, PARTS AND ACCESSORIES

Unless otherwise specified on the order, all orders for Products will refer to the type, model, line and body style of Products in production at the time CHRYSLER receives such order.

CHRYSLER may at any time and without prior notice declare obsolete or discontinue the manufacture, distribution or sale of any or all Products or any type, model, line or body style of Products, and may modify the construction or classification of any of them; and CHRYSLER will not be obligated to manufacture or sell replacement parts or accessories for such discontinued, declared obsolete or modified Products. CHRYSLER may act under this Paragraph 8 without notice and without any obligation to DISTRIBUTOR.

9. PRICES, TERMS AND TAXES

CHRYSLER will notify DISTRIBUTOR from time to time of the prices, charges and terms of purchase of Products sold under this Agreement, and CHRYSLER will charge DISTRIBUTOR for such Products according to the prices, charges and terms of purchase in effect at the date of shipment. CHRYSLER reserves the right, without prior notice, to change prices, charges and terms of purchase of any or all Products sold under this Agreement. DISTRIBUTOR will bear all costs and expenses incurred by CHRYSLER in effecting the sale and delivery to DISTRIBUTOR of Products, including, but not limited to, collection charges, boxing, decking, transportation to seaboard, loading and unloading, demurrage, storage, cartage, lighterage, heavy lift, consul fee, insurance and ocean freight. DISTRIBUTOR

also agrees to pay all excise and any other taxes that may be levied on Products or on the sale, shipment, ownership or use thereof whether or not such taxes are levied on or paid by CHRYSLER.

10. PAYMENT

Unless CHRYSLER otherwise agrees in writing, the terms of payment will be cash with the order or an irrevocable letter of credit confirmed by a bank acceptable to CHRYSLER. The place of payment and the currency of payment will be as designated by CHRYSLER in writing from time to time.

11. COLLECTION OF INDEBTEDNESS

CHRYSLER may apply towards the payment of any amount due from DISTRIBUTOR to CHRYSLER, its parent Chrysler Corporation, or any of its or their subsidiary, associated or controlled companies, any credit owning to DISTRIBUTOR, and CHRYSLER at its option may collect any sums owing by DISTRIBUTOR to CHRYSLER by drawing on any credits or amount which may be owed to DISTRIBUTOR by any of said companies. All exchange and collection charges involved in the drawing of such credits will be for the account of DISTRIBUTOR.

12. DELIVERY AND TITLE

Upon acceptance of DISTRIBUTOR's orders, CHRYSLER undertakes to deliver through a forwarding agent and by carrier, both selected by CHRYSLER, Products covered by such orders to the port of entry in DISTRIBUTOR's country or to such other points as may be mutually agreed upon.

13. INSURANCE

CHRYSLER will arrange for all-risks marine insurance coverage on Products shipped to DISTRIBUTOR hereunder from the time such Products leave CHRYSLER's or manufacturer's premises through the time such Products reach final destination as provided in the shipping documents (warehouse to warehouse), under policies which will cover DISTRIBUTOR and CHRYSLER as their interests may appear; provided, however, that it may be exceptionally agreed, with the prior consent of CHRYSLER, which shall not be unreasonably withheld, that DISTRIBUTOR will arrange for such all-risks insurance, in which case CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies, will be added in the policy as an additional named insured to cover their interests as they may appear. The costs of all insurance whether arranged by CHRYSLER or DISTRIBUTOR shall be for the account of DISTRIBUTOR.

14. ACCEPTANCE OF SHIPMENT

If DISTRIBUTOR requests diversion of Products or fails to accept any shipment of Products, fails to make payment thereof when due or otherwise defaults in taking delivery of Products, CHRYSLER has the right to cancel in whole or in part any and all of DISTRIBUTOR's orders for Products, immediately and without notice to divert the Products in whole or in part to any other destination or destinations and/or to charge DISTRIBUTOR for the demurrage, freight, storage and any other expenses arising by reason of any diversion, failure or default.

15. CLAIMS FOR SHORTAGE OR MISTAKE

As a condition precedent to recovery for shortage, defect, damage or error in any shipment, claim for such alleged shortage, defect, damage or error must be made by DISTRIBUTOR: in the case of Products shipped unassembled (KD), within fifteen (15) days of unboxing or one hundred eighty (180) days of receipt, whichever first occurs; or as to all other Products within thirty (30) days after DISTRIBUTOR takes possession thereof at port of entry of the shipment on which such shortage, defect, damage or error is claimed. Claims submitted after the applicable expiration dates will not be considered or allowed.

16. COMPLIANCE WITH LAWS AND REGULATIONS

DISTRIBUTOR will cooperate fully with CHRYSLER in complying with, and by the execution of this Agreement DISTRIBUTOR represents that it will not knowingly violate, or will it sell to persons DISTRIBUTOR has cause to believe will themselves or through others violate, any law or regulation of the country of origin of Products or any other country having jurisdiction over the parties. CHRYSLER will endeavor to comply at all times with the requirements of the various customs laws and regulations of any country into which CHRYSLER ships Products, but CHRYSLER shall not be responsible for penalties that may result from packing, invoicing or shipping documents not being in accordance with the requirements of the country to which shipment is made.

17. WARRANTY

No warranties, express or implied, including, but not limited to, any implied warranty of merchantability or fitness for a particular purpose are made or will be deemed to have been made by CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies except the warranty by CHRYSLER to DISTRIBUTOR as it appears in the appropriate CHRYSLER or the manufacturer's service policy manual or bulletin or other official publication in effect at the time CHRYSLER sells such Products to DISTRIBUTOR. CHRYSLER neither assumes, nor authorizes any other person to assume for it or any of the foregoing companies, any other obligation or liability in connection with the sale of Products. DISTRIBUTOR will extend to its Dealers or to other customers purchasing Products from DISTRIBUTOR a warranty substantially similar to the warranty extended to it by CHRYSLER which shall, however, exclude the provisions of this sentence if such customers are not purchasing Products for re-sale. DISTRIBUTOR agrees to maintain complete and accurate books and records respecting claims DISTRIBUTOR may make regarding warranty service DISTRIBUTOR performs under this Agreement for at least two years from the date DISTRIBUTOR receives payment from CHRYSLER for such claims and DISTRIBUTOR agrees that CHRYSLER may inspect DISTRIBUTOR's books and records regarding such warranty service DISTRIBUTOR performs. DISTRIBUTOR will perform all warranty and other services hereunder as an independent contractor and not as the agent of CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies, and DISTRIBUTOR will assume responsibility for, and hold them harmless for all claims (including, but not limited

to, claims resulting from the negligence or willful acts or omissions of DISTRIBUTOR) against any of them arising out of or in connection with DISTRIBUTOR's performance of such service.

DISTRIBUTOR will be reimbursed for all warranty service at the rates and time allowances established by CHRYSLER from time to time. CHRYSLER reserves the right to adopt such other programs as it deems necessary to approve, supervise, observe, or verify the performance of warranty service and the preparation of warranty claims and to instruct DISTRIBUTOR's personnel in proper warranty service and administration. In order to carry out the above, CHRYSLER may place an employee in DISTRIBUTOR's place or places of business to supervise DISTRIBUTOR's warranty service. DISTRIBUTOR will include a substantially similar provision to this Paragraph 17 in its agreement with its Dealers.

18. OWNERSHIP AND USE OF TRADEMARKS, TRADE NAMES AND INVENTIONS

Except as permitted by express prior consent in writing by CHRYSLER DISTRIBUTOR will not use, or cause or allow to be used by any other person, partnership or company over whom it exercises any control either directly or indirectly (hereinafter referred to sometimes as Controlled Person or Controlled Persons) as a part of any company or business name, or in any other manner in connection with the advertising and sale of Products and services for Products, (a) any trademark or trade name adopted, owned or used by CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies (hereinafter referred to sometimes as Chrysler Trademarks and Trade Names) and including by way of

illustration but without limitation, the trademarks IMPERIAL, C H R Y S L E R, PLYMOUTH, DODGE DE SOTO, FARGO, MOPAR, VALIANT, DART, MITSUBISHI and the Pentastar Device trademark or (b) any word or insignia or combination thereof so nearly resembling Chrysler Trademarks and Trade Names as to be likely in CHRYSLER's opinion, to confuse or mislead the public. DISTRIBUTOR agrees upon written notice from CHRYSLER to immediately discontinue use of and to remove from its premises, and to cause all Controlled Persons to immediately discontinue any use of and to remove from their premises, any of the Chrysler Trademarks and Trade Names, words, insignia or combinations thereof including any signs, labels, stationery, advertising and reading material which, in CHRYSLER's opinion, is an improper use or reflects adversely on the good name of CHRYSLER, its parent Chrysler Corporation or of any of its or their subsidiary, associated or controlled companies or on their goods or services.

Immediately upon termination of this Agreement, DISTRIBUTOR will remove from its premises and discontinue the use of and will not thereafter use, and will cause all Controlled Persons to likewise remove from their premises and discontinue the use of and not thereafter use, any and all signs, labels, stationery, advertising and reading material that, in CHRYSLER's opinion, might make it appear to the public that DISTRIBUTOR or any Controlled Person is an authorized distributor or dealer in Products or in other goods or services therefore, of CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies.

DISTRIBUTOR agrees not to represent, sell, offer for sale or use as Products or other CHRYSLER goods, any goods unless such goods are manufactured or designed by

or for CHRYSLER and are identified by or with the consent of CHRYSLER as Products or other CHRYSLER goods.

Except for such use as CHRYSLER permits during the continuance of this Agreement, DISTRIBUTOR will not directly or indirectly obtain or attempt to obtain, or cause or allow any Controlled Person to do so, in any country or territory whatsoever during the continuance of this Agreement or any time thereafter, any right, title or interest by registration, patent, copyright or otherwise (a) in or to any of the Chrysler Trademarks and Trade Names, words, insignia or combinations thereof or (b) in or to any designs, improvements, or inventions whatsoever embodied in Products or other goods or services therefor, of CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies.

The foregoing provisions of this Paragraph 18 run and inure to the benefit of CHRYSLER, its parent Chrysler Corporation and its or their subsidiary, associated or controlled companies and to their successors and assigns and shall survive the termination of this Agreement. DISTRIBUTOR will insert provisions of the same tenor and import as are contained in the foregoing provisions of this Paragraph 18 in DISTRIBUTOR's agreement with each of DISTRIBUTOR's Dealers and agents so that they will be bound in like manner.

If DISTRIBUTOR fails to comply with any notice provided for in this Paragraph 18 given to it by CHRYSLER or fails to correct any breach of the terms of this Paragraph 18 which has been called to DISTRIBUTOR's attention by CHRYSLER within sixty (60) days from the effective date of any such notice, then DISTRIBUTOR shall pay to the amount of One Hundred U.S. Dollars ($100.00) for each day beyond such sixty (60) days until such notice is

complied with or such breach is corrected. The foregoing payments shall be liquidated damages and shall be in addition to and apart from any other damages or remedies available to CHRYSLER.

19. DISTRIBUTOR IS NOT AN AGENT

This Agreement does not create the relationship of principal and agent between CHRYSLER and DISTRIBUTOR, and under no circumstances is either party to be considered the agent of the other. DISTRIBUTOR buys and sells Products as an independent business enterprise for its own account. DISTRIBUTOR has no authority either to bind CHRYSLER to any obligation or to represent CHRYSLER in any circumstance, and DISTRIBUTOR agrees not to so bind or represent CHRYSLER. CHRYSLER will not be held responsible for the compliance with any legislation, executive order, decree, or other regulation affecting the agents, representatives, employees or workers or Dealers of DISTRIBUTOR, DISTRIBUTOR being solely responsible for such compliance.

20. TERM AND TERMINATION OF AGREEMENT

Unless sooner terminated as provided below, this Agreement shall continue in force for a term expiring on the last day of the month occurring two year(s) after the date it was finally executed.

During the term of this Agreement it may be terminated upon ninety (90) days prior written notice (a) by either party (i) if the other party or one of its principal owners, officers or managers acts in a manner which, in the opinion of the party terminating this Agreement, reflects adversely

on its name, goodwill, reputation or the reputation of its goods or services, or (ii) if the other party fails to perform fully its undertakings and obligations set out in this Agreement to the satisfaction of the terminating party, or (b) by CHRYSLER, if there should be any sale, transfer or relinquishment, voluntary or involuntary, by operation of law or otherwise, of any interest in the direct or indirect ownership of, or any change in the identity of the persons responsible for the direction and management of DISTRIBUTOR.

Notwithstanding any other provision in this Agreement to the contrary, this Agreement will terminate automatically without notice from either party on (a) an attempt by DISTRIBUTOR to assign this Agreement or any right or obligation hereunder without CHRYSLER's prior written consent (b) an assignment by DISTRIBUTOR of all or a substantial part of DISTRIBUTOR's assets for the benefit of creditors, (c) the insolvency of DISTRIBUTOR or of any member of DISTRIBUTOR if it is a partnership, (d) the institution of voluntary or involuntary proceedings by or against DISTRIBUTOR in bankruptcy or under insolvency laws or for a receivership or for the dissolution of DISTRIBUTOR (if it is a corporation or a partnership), (e) the death, incapacity, resignation or other elimination of DISTRIBUTOR (if it is an individual), or of any partner in DISTRIBUTOR (if it is a partnership), or (f) the substantial discontinuance of DISTRIBUTOR's distribution and resale activities in the Sales Area. DISTRIBUTOR agrees to advise CHRYSLER immediately in writing of the occurrence of any event specified in this Paragraph.

21. EFFECT OF TERMINATION OR EXPIRATION

Neither party will be liable to the other for damages of any kind on account of expiration or of termination, with or without notice, of this Agreement, whether damages result from loss through commitments on obligations or leases, from loss of investment or of present or prospective profits, from inability to meet obligations or from any other cause, notwithstanding the failure of DISTRIBUTOR to order Products or the failure of CHRYSLER to furnish and deliver Products to DISTRIBUTOR.

If, after the effective date of expiration or termination, CHRYSLER accepts orders from DISTRIBUTOR or otherwise transacts business with DISTRIBUTOR related to the sale of Products, all such transactions will be governed by the same terms that this Agreement provides so far as those terms are applicable, but no such acceptance of orders or transaction of business shall be construed as a renewal of this Agreement or as a waiver of termination. Expiration or termination of this Agreement will cancel all unfilled orders for Products, whether or not CHRYSLER has accepted such orders, except for such Products as are listed in a written notice sent from CHRYSLER to DISTRIBUTOR before the effective date of such expiration or termination or in the case of termination without notice within thirty (30) days of the effective date of such termination.

On expiration or termination of this Agreement, CHRYSLER or its nominee will have the right, at the option of CHRYSLER, to purchase, and DISTRIBUTOR agrees to sell, free and clear of any liens or encumbrances, all or part of DISTRIBUTOR's inventory of new and unused Products purchased by DISTRIBUTOR from CHRYSLER and which are the property of DISTRIBUTOR and all or any signs

and/or special tools or goods bearing any trademark or trade name of CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated or controlled companies, which signs, special tooling and/or goods are the property of DISTRIBUTOR, on the following basis: new and unused motor vehicles at net landed cost to DISTRIBUTOR including duty (current at the time of expiration or termination) paid, less any cost which, in the sole discretion of CHRYSLER, is necessary to finish or recondition any such motor vehicles to restore them to their original condition; replace parts and accessories whose numbers appear in the price list currently in effect at the time of expiration or termination at net landed cost to DISTRIBUTOR including duty (current at the time of expiration or termination) paid, less ten percent (10%) handling charges and less any cost which, in the sole discretion of CHRYSLER, is necessary to finish or re-condition any such replacement parts and accessories to restore them to saleable condition; all signs of a type recommended by CHRYSLER belonging to DISTRIBUTOR, showing the names of Products or any other name, mark or designation that might make it appear that DISTRIBUTOR is an authorized distributor for motor vehicles, parts and accessories, manufactured and/or distributed by CHRYSLER, at a price to be agreed upon by CHRYSLER and DISTRIBUTOR; and special tools of a type recommended by CHRYSLER, adapted only to the servicing of passenger cars and trucks manufactured and/or distributed by CHRYSLER and purchased by DISTRIBUTOR during the thirty-six (36) months immediately preceding the effective date of expiration or termination at a price and under terms and conditions to be agreed upon by CHRYSLER and DISTRIBUTOR. CHRYSLER or its nominee may exercise such option only by notice sent before the ninetieth (90th) day after the effective date of expiration or termination of

this Agreement. DISTRIBUTOR agrees to include in its agreement with its Dealers a provision that such agreements will terminate upon the termination of this Agreement.

22. LEGAL INTERPRETATION

This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein, and will bind the heirs, executors, administrators, successors and assigns of both parties. If it is found that any portion or portions of this Agreement violate in any particular any law or any government or governmental unit, division or subdivision having jurisdiction in the premises, and said violation would cause said authorities to consider this Agreement as void and without effect regardless of the present election of law, then within that political unit, division or subdivision, such portion or portions of this Agreement will be of no force and effect, and this Agreement will be treated in any such jurisdiction as if such portion or portions had not been inserted herein.

23. FORMER AGREEMENTS AND WAIVER, MODIFICATION OR ASSIGNMENT OF THIS AGREEMENT

This Agreement is the entire agreement between the parties relating to the purchase of Products by DISTRIBUTOR from CHRYSLER for resale, and it cancels and supersedes all earlier agreements, written or oral, between CHRYSLER and DISTRIBUTOR relating to the purchase by DISTRIBUTOR of Products.

No waiver, modification or change of any of the terms of this Agreement or change or erasure of any printed parts of this Agreement or addition to it (except filling of blank

spaces and lines prior to execution of this Agreement) will be valid or binding on CHRYSLER unless approved in writing by a duly authorized officer of CHRYSLER. No waiver by CHRYSLER of any default in the performance of any part of this Agreement by DISTRIBUTOR will apply to or be deemed a waiver of such part of this Agreement or of any other default under such part or under any other part of this Agreement.

DISTRIBUTOR may not assign this Agreement or any right or obligation hereunder without the prior written consent of CHRYSLER executed by a duly authorized officer thereof.

CHRYSLER may assign this Agreement or delegate authority to perform any part of its obligations under this Agreement only to Chrysler Corporation or to a subsidiary or associated or controlled company of either of them and will advise DISTRIBUTOR in writing of such assignment or such delegation of performance.

24. INABILITY TO PERFORM

In addition to any other exception from liability specifically provided for in this Agreement, neither DISTRIBUTOR nor CHRYSLER will be liable for failure to perform any part of this Agreement when the failure is due to fire, flood, strikes or other labor disputes, shortages of material, transportation difficulties, accident, war, riot, acts of God, insurrection, civil disturbance, acts of government, governmental regulation or other circumstances beyond the control of the parties.

25. NOTICES

Any notice under this Agreement will be sufficient if in writing sent to the other party by telegram, or by cable or

radiogram if there are no facilities for sending telegrams between the locations of the parties at their addresses described below, with confirmation copy of such notice sent to such other party the same day by registered air mail, where such service is available, if to DISTRIBUTOR addressed to it at its principal office stated in the introductory paragraph of this Agreement, and if to CHRYSLER addressed to it at Post Office Box 158, 1211 Geneva 24, Switzerland. DISTRIBUTOR agrees, in addition, to send a copy of said notice by air mail to the appropriate CHRYSLER regional office located at: CHRYSLER INTERNATIONAL S.A., 68 KNIGHTSBRIDGE, LONDON, SWIX 7LH, ENGLAND.

By notice given as stated above in this Paragraph 25 either party may specify a different address for receiving notice under this Agreement. Any notice given as stated above in this Paragraph shall be effective as of the first business day, in the city of destination, following the date of dispatch thereof. The provisions of this Paragraph 25 shall survive any expiration or termination of this Agreement.

26. DIRECT SALES

CHRYSLER and DISTRIBUTOR agree that CHRYSLER may, at its option, forward orders received from DISTRIBUTOR pursuant to this Agreement to its parent company, Chrysler Corporation, or to any subsidiary, associated or affiliated company (hereinafter called "SUPPLIER") which will then sell the Products covered by such order directly to DISTRIBUTOR, CHRYSLER and DISTRIBUTOR hereby acknowledge and agree that, unless otherwise agreed in writing, any such direct sales between SUPPLIER and DISTRIBUTOR will be governed by the terms and conditions contained on the order form and in this Agreement and that any such sales will not constitute

the basis of forming a distributor relationship between SUPPLIER and DISTRIBUTOR. Further, DISTRIBUTOR acknowledges and agrees that any claim or controversy resulting from such direct sales by SUPPLIER will be handled by CHRYSLER as though such sale had been made by CHRYSLER.

27. MINIMUM SALES PENETRATION

Notwithstanding the provisions of Paragraph 1 of this agreement, CHRYSLER hereby undertakes not to sell Products except automotive replacement parts and accessories for purpose of resale to any person, firm or corporation other than the DISTRIBUTOR in the sales area so long as the DISTRIBUTOR in every year following the signing of this Agreement achieves the minimum sales penetration for the said year. The minimum sales penetration, for purposes of this Agreement, shall be determined separately for the ensuing model year, by mutual agreement of the parties which shall be reached no later than September 30 of each year and shall be set forth in a written instrument signed by authorized representatives of CHRYSLER and DISTRIBUTOR. It shall be an essential condition to this Agreement that DISTRIBUTOR achieve in each model year the agreed minimum sales penetration in the sales area. Should DISTRIBUTOR fail to achieve said sales penetration, unless said failure was due to CHRYSLER's failure to ship products timely ordered by DISTRIBUTOR or by force majeure as defined in paragraph 24 of this Agreement, CHRYSLER may, at its option, terminate this Agreement upon ninety (90) days prior written notice as provided in the second paragraph of paragraph 20 of this Agreement and/or appoint a new distributor for the sales area.

Nothing in this Agreement shall be construed as in any way limiting CHRYSLER's right to sell or otherwise convey

a property interest in the Products to employees of CHRYSLER, its parent Chrysler Corporation or any of its or their subsidiary, associated, or controlled companies to governmental bodies or to persons, firms or corporations desiring to purchase or otherwise obtain a property interest in the Products for their own use or for the use of their agents or representatives in the sales area or in any part of the World without granting a commission to the DISTRIBUTOR.

28. SIGNATURE

This Agreement becomes valid on being signed for CHRYSLER by a duly authorized officer of CHRYSLER and on being signed for DISTRIBUTOR by a duly authorized officer of DISTRIBUTOR if a corporation, limited liability company or similar entity, or by one of the general partners of DISTRIBUTOR if a partnership, or by DISTRIBUTOR if an individual.

In Witness Whereof, the parties hereto have signed this Agreement which is finally executed at Geneva, Switzerland, this 31st day of OCTOBER, 1979.

CHRYSLER INTERNATIONAL S.A.

By: /s/ F.M. ROGERS
F.M. ROGERS
Title: V.P. and Director

By: /s/ R. EIGENHEER
R. EIGENHEER
Title: Company Secretary

Witness: /s/ E. Amann
E. Amann

SOLER CHRYSLER PLYMOUTH INC.
(Distributor Firm Name)

By: [Illegible]
Title: President
Witness: .....

Exhibit B to the Complaint

SALES PROCEDURE AGREEMENT

Chrysler International S.A.
Soler Chrysler Plymouth Inc.
Mitsubishi Motors Corporation

This Agreement is entered into as of 31 October 1979 by and between:

—CHRYSLER INTERNATIONAL S.A., a corporation existing and organized under the laws of the Swiss Confederation with its registered office in 1211 Geneva 24 at 8 route des Acacias(hereinafter referred to as CISA): party of the first part,

—BUYER, Soler Chrysler-Plymouth Inc., Carretera No. 2 KM. 6.8 Pueblo Viejo, Guaynabo, Puerto Rico 00657: party of the second part; and

—MITSUBISHI MOTORS CORPORATION, a corporation existing and organized under the laws of Japan with its registered office in Tokyo at 33-8, Shiba 5-chome, Minato-ku (hereinafter referred to as MMC), party of the third part;

WHEREAS, BUYER AND CISA entered into on 31 October 1979 a Distributor Agreement (hereinafter referred to as the Distributor Agreement) whereby CISA granted BUYER the distribution rights to the products manufactured by MMC defined in the Distributor Agreement for use and resale in Metropolitan San Juan, Puerto Rico; including the present territorial jurisdiction of the Municipalities of San Juan, Bayamon, Carolina, Guaynabo (hereinafter referred to as the Territory); Catano, Toa Baja, Trujillo Alto and Rio Piedras, Hatillo, Arecibo, Barceloneta, Dorado,

Florida, Manati, Vega Alta, Vega Baja, Toa Alta, Canovanas, Loiza, Rio Grande;

WHEREAS, pursuant to Article 26 of the Distributor Agreement, CISA may forward orders received from BUYER to an associated company;

WHEREAS, MMC and CISA have agreed that MMC, which is an associated company of CISA, may sell such MMC Products directly to BUYER pursuant to Article 26 of the Distributor Agreement;

WHEREAS, MMC and BUYER wish to record their agreement with respect to the terms and conditions applicable to such direct sales and CISA and BUYER hereby acknowledge that the terms and condition of sale contained in the Distributor Agreement are hereby varied as herein set forth;

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, CISA, BUYER, and MMC agree as follows:

I—TERMS AND CONDITIONS OF DIRECT SALES

A. Direct Sales

Subject to the terms and conditions of this Agreement, MMC agrees to sell and BUYER agrees to purchase the motor vehicles manufactured by MMC listed in the Distributor Agreement (hereinafter referred to as Motor Vehicles) and replacement parts and accessories for Motor Vehicles (hereinafter referred to as Spare Parts). For the purposes of this Agreement, the term Products means Motor Vehicles and Spare Parts.

B. Orders and Schedule of Purchases of Motor Vehicles

BUYER shall place firm orders for Motor Vehicles on a form approved by MMC in accordance with the Ordering

Procedure previously delivered to BUYER or any amended or substituted procedure adopted by MMC (hereinafter referred to as the Ordering Procedure) in effect on the date of MMC's receipt of such orders. BUYER shall submit, together with each such firm order, its proposed monthly purchasing schedule of Motor Vehicles for the period and in the manner stipulated in the Ordering Procedure. BUYER agrees to send a copy of each order for Motor Vehicles placed with MMC to CISA at the address set forth above or to such other address as may be specified by CISA to BUYER.

C. Orders for Spare Parts

BUYER shall place firm orders in a manner approved by MMC for Spare Parts in accordance with the Distributor's Guide for MMC Parts Operation previously delivered to BUYER or any amended or substituted guide adopted by MMC (hereinafter referred to as the Guide for Parts Operation) in effect on the date of MMC's receipt of such orders and well in advance, taking into consideration that a period of time will be required by MMC to manufacture Spare Parts or to procure them for shipment. BUYER agrees to send a copy of each order for Spare Parts placed with MMC to CISA at the address set forth above or to such other address as may be specified by CISA to Buyer.

D. Acceptance of Orders

1. MMC, at its option, shall decide whether it will accept or not, wholly or partially, the firm orders for Products placed by BUYER, but BUYER shall not have any right to change the content of its firm orders after such orders reach MMC. MMC will not be responsible for non-acceptance of orders or delays or changes occurring in manufacture or shipment of Products, nor will anything

in this Agreement obligate MMC to deliver to BUYER any particular number, type or assortment of Products.

2. The acceptance by MMC of BUYER's firm orders and confirmation of sales shall be made either (i) by the completion by MMC of the Export Sales Contract previously delivered to BUYER or any amended or substituted export sales contract adopted by MMC (hereinafter referred to as the Export Sales Contract) in effect on the date of MMC's acceptance of an order or (ii) by telex or other written notification to BUYER. Whether MMC uses its Export Sales Contract or otherwise notifies BUYER, BUYER shall be bound by any terms set forth in MMC's Export Sales Contract in effect on the date of MMC's acceptance of the order in question, except that in the event of any inconsistency between any provision of this Agreement and any provision of such Export Sales Contract, the provisions of this Agreement shall be controlling.

E. Prices

MMC has furnished BUYER with its current price list for Products and will furnish Buyer with notices and copies of any amendments or supplements thereto. MMC will sell to BUYER at the prices in effect on the date of MMC's acceptance of BUYER's order. MMC reserves the right without prior notice to change the prices of any or all Products without notice to BUYER. MMC will sell Products at FOB outbound carrier, Japanese port of exit prices. Such prices shall include inland freight, ocean or air preparation and all other charges incurred in shipping Products to the port of exit. Special required charges such as third party inspection charges, consular fees, etc. shall be prepaid by MMC and shall be charged to BUYER as line items on invoices, BUYER agrees to pay all excise and other taxes that may be levied on Products or on the sale, shipment, ownership

or use thereof whether or not such taxes are levied on or paid by MMC. If shipment of ordered Motor Vehicles is not made within one month from the end of the month in which MMC produced such Motor Vehicles due to any reason which is not imputable to MMC, BUYER shall pay MMC a distress unit penalty to compensate MMC for storage costs and interest charges incurred by MMC for keeping such Motor Vehicles in stock in accordance with the Ordering Procedure in effect on the date of such production. If shipment of ordered Spare Parts is not made within two months from the date on which MMC packed such Spare Parts due to any reason which is not imputable to MMC, BUYER shall pay MMC a distress penalty to compensate MMC for storage costs and interest charges incurred by MMC for keeping such Spare Parts in stock in accordance with the Guide for Parts Operation in effect on the date of such packing. MMC will notify BUYER of the date of packing Spare Parts in Order Status Reports which will be sent to BUYER on a monthly basis.

F. Payment

Payment for Products to MMC by BUYER shall be made, unless otherwise agreed upon, by irrevocable, confirmed, without recourse, unrestricted and at sight letters of credit to be opened in favour of MMC through reputable first class banks acceptable to MMC. Such letters of credit shall be valid for at least 120 days after they are opened and shall be opened within 15 days after BUYER's receipt of MMC acceptance as provided in paragraph D(2) of this Article or by such other earlier date as may be required by MMC. BUYER shall notify MMC promptly of the opening of such letters of credit. If BUYER fails to provide such letters of credit, MMC shall have the option of reselling the contracted goods for BUYER's account, holding the goods

for BUYER's account and risk and/or cancelling the Export Sales Contract relating to such goods and claiming for damages caused by BUYER's default.

G. Delivery

Delivery of Products to BUYER by MMC shall be made on such terms and conditions as shall be mutually agreed upon, provided that in any event the title and risk of loss to Products shall pass to BUYER upon loading of Products on board an ocean going vessel in Japan, or, in case of transportation by air, upon loading on an airplane at such point in Japan as MMC may select. BUYER may from time to time request MMC to arrange for ocean or air freight and/or ocean marine insurance coverage on shipments of Products and MMC will endeavour to comply with BUYER's request; provided, however, that MMC shall have no liability to pay for such freight and insurance on behalf of BUYER. If MMC does not arrange ocean or air freight, BUYER agrees that carriers will be made available at such times and places as may be specified by MMC. MMC may make partial shipments of the Products included in any order or combine in a single shipment Products included in more than one order. The date of the bill of lading relating to any shipment shall be conclusively presumed to be the date of such shipment.

H. Claims

1. All claims for shortages and discrepancies in shipments of Motor Vehicles in built up condition and in shipments of Spare Parts must be sent to MMC by BUYER within 60 days after the arrival at the port of destination of any shipment as to which such shortage or discrepancy is claimed, and claims submitted after 60 days have elapsed will not be considered or allowed.

2. All claims for shortages and discrepancies in shipments of Motor Vehicles in knocked down condition must be sent to MMC by BUYER before the earlier of 60 days after unboxing and 180 days after the arrival at the port of destination of any shipment as to which such shortage or discrepancy is claimed, and claims submitted after such earlier date will not be considered or allowed.

I. Conditions and Warranties

1. No conditions, representations or warranties, express or implied by law, are made or will be deemed to be made by MMC in respect of Products sold hereunder, except for those provided for in the Service Policy and Warranty Procedure Manual previously delivered to BUYER or any amended or substituted manual adopted by MMC (hereinafter referred to as the Service Policy and Warranty Procedure Manual) in effect on the date of shipment of such Products. SUCH WARRANTIES ARE EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER agrees, and agrees to cause its Dealers to agree, that BUYER, its Dealers and their customers shall not have any claim against MMC with respect to any warranty other than as expressly provided for herein.

2. BUYER shall extend to its Dealers a warranty substantially similar to the warranty extended to it by MMC and cause such Dealers to extend such warranty to retail purchasers of Motor Vehicles. It is mutually agreed that MMC will not be in any way responsible, under the Service Policy and Warranty Procedure Manual or otherwise, in respect of repairs required to Motor Vehicles as a result of the use

of parts not made, supplied or approved by MMC. In the case of Motor Vehicles sold to BUYER in knocked down condition, MMC's warranty responsibility under this paragraph I will be limited to the components and accessories included in the KD pack. MMC agrees that the claims for money payable to BUYER and approved under the Service Policy and Warranty Procedure Manual will be paid to BUYER as promptly as practicable.

J. Supply Through Trading Companies

MMC may enter into an agreement with one or more trading companies and may supply all or part of the Products being sold hereunder through trading companies acting as exporters. In the event that MMC supplies any Products through trading companies, MMC may delegate any of its rights or obligations contained in the paragraphs B through H of this Article to such trading companies.

K. Technical Assistance

A separate agreement shall be concluded between MMC and BUYER in case technical assistance is required by BUYER in connection with assembly and/or progressive local manufacture of components and parts of Motor Vehicles.

L. Dealer Identification Program

BUYER agrees to participate in MMC's dealer identification program and to cause Dealers to identify their premises and operations in a manner consistent with the worldwide MMC dealer identification program.

II--TECHNICAL AND ENGINEERING CHANGES

MMC shall have the right to change at any time the designs and specifications of any Products and in such case

BUYER shall not have the right to refuse, or to claim any reduction in the price of, any Products which are changed from those ordered by BUYER. BUYER shall not modify the structure, engineering or design of any Products purchased for resale hereunder, not do anything in that regard which would in any way infringe, impeach or lessen the validity of any patents associated with such Products which are owned by or licensed to MMC.

III—COMPLIANCE WITH LAWS AND REGULATIONS

MMC will endeavor to comply at all times with the requirements of the various customs laws and regulations of the Territory of which BUYER has advised MMC but MMC shall not be responsible for penalties that may result from packing, invoicing or shipping documents not being in accordance with the requirements of the country to which shipment is made. BUYER will not, nor will it sell to persons it has reason to believe will themselves or through others, violate any law or regulation of any country having jurisdiction over the parties.

BUYER has been informed as to the specifications currently incorporated in Motor Vehicles being sold by MMC for export. BUYER agrees to advise MMC promptly as to any change in such specifications required by any laws, regulations or standards applicable in the Territory or the adoption of any amendment thereto or of any new law, regulation or standard with respect to such specifications.

IV—TRADEMARKS AND PATENT RIGHTS

BUYER acknowledges and agrees that MMC is the proprietor of certain trademarks, trade names and designations listed in Exhibit A (such trademarks, trade names and designations and any other trademarks, trade names and

designations adopted, owned or used by MMC are hereinafter referred to as Trademarks), and that BUYER may use Trademarks only in connection with the advertising and sale of Products. BUYER will not use, or cause or allow to be used by any other person, partnership or company over which it exercises any control either directly or indirectly (hereinafter referred to as a Controlled Person), any Trademarks or any mark embodying any portion of any Trademark or being an adaptation thereof closely resembling the same or being such as likely to be confused therewith in the name or names in which BUYER or any Controlled Person does business. BUYER and Controlled Persons will not obtain or attempt to obtain any right, title or interest by registration, copyright, patent or otherwise, in any Trademark, or in or to any designs, improvements or inventions whatsoever embodied in Products, and hereby expressly waive any rights they may have so to do. The manner in which BUYER and Controlled Persons shall use Trademarks shall be subject to prior approval by MMC. In the event that MMC shall object to the manner in which BUYER or any Controlled Person is using or allowing Dealers to use any Trademark, either on Products or in advertising or otherwise, BUYER agrees promptly to remedy the situation to MMC's satisfaction. BUYER further agrees that, upon the termination of this Agreement for any cause whatsoever, it will discontinue and cause all Controlled Persons to discontinue the use of Trademarks or any mark embodying any portion of any Trademark or being an adaptation thereof or closely resembling the same or being such as likely to be confused therewith, either directly or indirectly, in connection with its business, and will remove and destroy or surrender to MMC, as the case may be, all signs, stationery, printed matter, advertisements, advertising cuts or anything else containing any Trademark that may make it appear that BUYER or any Controlled

Person is still handling Products, all without expense to MMC. BUYER will execute, and will cause all Controlled Persons to execute, at any time at the request of MMC such documents as may be required to enable MMC to cancel and/or take full possession of any rights, title or interest acquired by BUYER or any Controlled Person in respect of any Trademark. BUYER shall notify MMC promptly after it shall have come to its attention of any simulation, imitation or infringement of any Trademarks. BUYER shall not oppose any patent application filed by MMC or contest the validity of any patent right owned by MMC, and shall not file or cause to be filed any patent application in the Territory or any other country with respect to any technique contained within Products delivered by MMC to BUYER under this Agreement. BUYER also agrees that it will include in all its dealer agreements provisions to the effect set forth in this Article.

V—CESSATION OF PRODUCTION OF MOTOR VEHICLES

MMC may at any time and without prior notice declare obsolete or discontinue the manufacture, distribution or sale of any or all Motor Vehicles or any type, model, line or body style of Motor Vehicles, or modify the construction or classification of any of them; and MMC shall not be obligated to manufacture or sell Spare Parts for such declared obsolete, discontinued or modified Motor Vehicles. MMC may act under this Article without notice and without any obligation to BUYER and BUYER shall have no claim against MMC for any such action.

VI—ARBITRATION OF CERTAIN MATTERS

All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I—B through V of this Agreement or for the breach thereof,

shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

VII—EFFECTIVE DATE, TERM AND TERMINATION

This Agreement shall become effective on 1st November, 1979, and shall be applicable to all purchases of MMC Products from MMC by BUYER on and after such date. This Agreement shall continue in full force and effect for a term expiring on the day the Distributor Agreement and any renewal thereof shall expire. Notwithstanding anything to the contrary hereinabove, this Agreement shall automatically terminate, with no notice required from any party to the other, upon the termination prior to expiration of the Distributor Agreement or any renewal thereof, in accordance with its terms. No party hereto will be liable to the others for damages of any kind on account of expiration or termination of this Agreement, provided, however, that no such expiration or termination will release BUYER or MMC from the payment of any sum or sums relating to transactions under this Agreement that either BUYER or MMC may owe to the other at such time or thereafter.

VIII—CISA RECEIVABLES

BUYER and MMC hereby acknowledge that the execution of this Agreement does not relieve BUYER from the payment of any sum or sums which BUYER may owe CISA or which may become payable to CISA after the execution of this Agreement by reason of the prior sales by CISA of any MMC Products to BUYER under the Distribution Agreement. CISA hereby acknowledges to BUYER that

the execution of this Agreement does not relieve CISA from the payment of any sum or sums which CISA may owe BUYER by reason of any prior transactions under the Distributor Agreement.

IX—DISCLAIMER

BUYER hereby irrevocably renounces any claim against CISA under the Distributor Agreement or any specific credit agreement for any alleged non-performance by CISA of its obligations thereunder as they may relate to such obligations hereunder undertaken by MMC with respect to MMC Products and further BUYER hereby represents that it shall not terminate the Distributor Agreement for any alleged breach thereof to the extent that MMC has fulfilled any such obligations of CISA.

X—BUYER NOT AN AGENT AND NOT AN MMC DISTRIBUTOR

This Agreement does not create the relationship of principal and agent between BUYER and MMC and under no circumstances is either party to be considered the agent of the other. Further, BUYER and MMC hereby recognize that any direct sales made by MMC to BUYER pursuant to this Agreement shall under no circumstances be construed as forming a distributor relationship between BUYER and MMC.

XI—CISA AS PARTY

By signing this Agreement as a party, and the entering into force of this Agreement is subject to such execution, CISA does not undertake or assume any obligations undertaken or assumed by BUYER and MMC. Furthermore,

MMC is not to be considered as the agent of CISA under any circumstances whatsoever.

XII—STATUS OF DISTRIBUTOR AGREEMENT

The Distributor Agreement remains in full force and effect between CISA and BUYER except that the provisions thereof which are in conflict with this Agreement shall be deemed to be in suspense during the term hereof, and to the extent that no such conflict exists, MMC hereby agrees not to take any action inconsistent with the provisions of the Distributor Agreement not deemed to be in suspense in its relationship with BUYER pursuant to this Agreement. The provisions of this Article shall also apply to any renewal of the Distributor Agreement. BUYER and CISA hereby agree that no agreement between BUYER and CISA relating to payment terms for the purchase of MMC Products from CISA shall be applicable to the purchase of MMC Products by BUYER from MMC pursuant to this Agreement and any such agreement shall automatically terminate upon the discharge by BUYER of all obligations thereunder relating to the purchase of MMC Products by BUYER from CISA made prior to the effective date hereof. In the event that this Agreement is terminated in whole or in part other than pursuant to Article VII hereof, CISA and BUYER agree that the Distributor Agreement shall terminate simultaneously.

XIII—AMENDMENTS

This Agreement may be amended only with the prior consent of all parties; provided, however, that MMC and BUYER may enter into an amendment of any of the provisions of Articles I—B through V of this Agreement without CISA's consent and without CISA executing any such

amendment; provided, further, no such amendment shall modify provisions of this Agreement other than said Articles I—B through V without CISA's written consent.

XIV—APPLICABLE LAW

This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein.

XV—INABILITY TO PERFORM

In addition to any other exception from liability specifically provided for in this Agreement, BUYER, CISA and MMC will not be liable for failure to perform any part of this Agreement when the failure is due to fire, flood, strikes, or other labor disputes, shortage of materials, transportation difficulties, accident, war, riot, acts of God, insurrection, civil disturbance, acts of government, governmental regulation or other circumstances beyond the control of the parties, provided, however, that the above shall not relieve any party from its obligations to perform its part of this Agreement at such time and to such extent as may be possible subsequent to the intervention of the above-cited events or occurrences and under no circumstances is any party relieved by any of the above-cited events or occurrences from its obligations to make any payments due hereunder.

IN WITNESS WHEREOF this Agreement is executed in triplicate in Geneva as of the date first above written.

BUYER
By: /s/ [Illegible]
President

MITSUBISHI MOTORS CORPORATION
By: /s/ [Illegible]

CHRYSLER INTERNATIONAL S.A.
By: /s/ F.M. ROGERS
F.M. Rogers
Vice President
and Directors

By: /s/ R. EIGENHEER
R. Eigenheer
Company Secretary

[Exhibit A "Three Diamonds" Mark omitted in printing]

Notice of Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

TO THE HONORABLE COURT:

Plaintiff Mitsubishi Motors Corporation ("MMC") based upon the attached affidavits and complaint, and upon the memorandum of law and all the files and proceedings herein, respectfully moves this Court for a Temporary Restraining Order and Preliminary Injunction enjoining defendant and its officers, employees or agents and all persons acting in concert with them, from instituting or prosecuting any other action against MMC, in any Commonwealth, state or federal court, arising out of or relating to the matters, occurrences, and transactions set forth in the complaint herein, pending the trial of this action and the arbitration sought therein.

In San Juan, Puerto Rico, on this 15th day of March, 1982.

McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA
G. P. O. Box 4225
San Juan, Puerto Rico 00936
Telephone No. 753-3000

By: /s/ SAMUEL T. CESPEDES
Samuel T. Cespedes

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, New York 10111
Telephone No. (212) 841-5700

By: /s/ ROBERT L. SILLS
Robert L. Sills

Affidavit of Mitsuaki Mitsukuri

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

MITSUAKI MITSUKURI, being duly sworn, deposes and says:

1. I am General Manager of the Latin America Group of plaintiff Mitsubishi Motors Corporation ("MMC"). As such, I am the person in charge of the sale of MMC products in Puerto Rico. I make this affidavit on personal knowledge in support of MMC's motion for an order (a) compelling Soler Chrysler-Plymouth, Inc. ("SCP") to proceed to arbitration with MMC pursuant to the terms of a written contract between them and (b) restraining SCP from commencing or prosecuting any other action concerning the matters and transactions set forth in the complaint herein.

The Business of MMC

2. MMC is a corporation organized and existing under the laws of Japan, with its principal place of business in Tokyo, Japan. MMC is a diversified manufacturer of motor vehicles.

3. MMC now sells its products in Puerto Rico through the network of distributors and dealers of Chrysler International, S.A. ("CISA"), a wholly-owned subsidiary of Chrysler Corporation ("Chrysler"). These products, which bear both Chrysler and MMC trademarks, are sold through the network of Dodge and Chrysler-Plymouth dealers throughout the Island.

The Business of SCP

4. SCP is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

5. SCP is or was engaged in the sale and distribution in metropolitan San Juan, including the municipalities of San Juan, Bayamón, Carolina, Guaynabo, Cataño, Toa Baja, Trujillo Alto, Río Piedras, Hatillo, Arecibo, Barceloneta, Dorado, Florida, Manatí, Vega Alta, Vega Baja, Toa Alta, Canóvanas, Loíza and Río Grande of Puerto Rico of passenger cars and trucks manufactured or distributed by Chrysler under the "Plymouth" and "Chrysler" tradenames pursuant to the terms of a written distributorship contract between CISA and SCP dated October 31, 1979 (the "Distribution Contract"). A copy of the Distribution Contract is annexed hereto as Exhibit A.

6. Among the vehicles distributed by SCP are the Plymouth Champ and Plymouth Sapporo passenger cars, and the Plymouth Arrow pickup truck, all of which are currently manufactured for Chrysler by MMC ("MMC Products").

7. SCP acts both as a distributor and dealer in MMC Products. It sells vehicles directly to the public and also acts as a wholesaler of vehicles to other dealers in the northern part of Puerto Rico.

Execution of the Sales Procedure Agreement

8. In 1979, CISA and MMC determined that it would be more efficient for CISA distributors to order vehicles directly from MMC, while remaining CISA dealers. Accordingly, on or about October 31, 1979, SCP, MMC and CISA entered into a Sales Procedure Agreement, a copy of which is annexed hereto as Exhibit B.

9. As set forth below, SCP breached numerous material conditions of the Sales Procedure Agreement, which expired by its terms on October 31, 1981. Pursuant to the Sales Procedure Agreement, MMC now seeks arbitration concerning these breaches of contract.

Failure to Pay for Ordered Vehicles

10. Despite MMC's warnings to officers of SCP that the market for automobiles was weakening, SCP ordered 966 vehicles during early 1981 pursuant to Article I(F) of the Sales Procedure Agreement, at a total f.o.b. price of $3,526,168, but failed to pay therefor. Those vehicles (the "Japan Stock") are presently in Japan. They were manufactured at the request of SCP, and were made to its specifications and requirements for the Puerto Rican Market.

11. SCP remains indebted to MMC in the amount of $3,526,168 for these vehicles, and has stated that it will not pay any part of this amount.

12. MMC has attempted to resolve the financial difficulties caused by the Japan Stock. Nearly half of these vehicles are 1981 models, and, unless they can be quickly sold, will lose a substantial additional part of their value. MMC is now negotiating with two banks and with the other two CISA distributors in Puerto Rico to arrange for sale of the Japan Stock.

13. As a direct result of SCP's failure to pay for the Japan Stock and maintain the level of MMC sales in Puerto Rico, MMC's business has been materially impaired. In calendar year 1980, MMC's share of the Japanese import market in Puerto Rico was approximately 25.6%. In calendar year 1981, it had fallen to approximately 16.2%. Moreover, the Chrysler-Plymouth dealers in SCP's territory are now without a source of supply for new automobiles,

thus endangering their businesses and harming MMC's public image.

Failure to Pay Distress Unit Penalties

14. Among the terms and conditions set forth in Article I(E) of the Sales Procedure Agreement is the following:

> "If shipment of ordered Motor Vehicles is not made within one month from the end of the month in which MMC produced such Motor Vehicles due to any reason which is not imputable to MMC, BUYER shall pay MMC a distress unit penalty to compensate MMC for storage costs and interest charges incurred by MMC for keeping such Motor Vehicles in stock in accordance with the Ordering Procedure in effect on the date of such production."

15. Pursuant to the Sales Procedure Agreement, all of the 966 MMC vehicles described above remained unshipped for periods of one month or more. As of February 28, 1982, SCP had thereby incurred $290,012.58 in distress unit penalties, which it has failed to pay.

SCP's Financial Collapse

16. I am informed that on or about February 23, 1982, SCP surrendered 412 vehicles, almost all of its MMC inventory, to its bank because of its inability to pay its loans. As a result, SCP has neither significant current inventory nor any apparent means of purchasing vehicles in the future.

17. SCP's principal bank is currently attempting, with MMC's assistance, to sell these 412 vehicles through the two other CISA distributors. SCP, however, has refused to cooperate, and, to the contrary, appears likely to attempt to frustrate this transaction by instituting litigation against MMC.

18. The bank has indicated that if the sale to the other CISA distributors is frustrated, it may either (a) sell the units itself in a "distress" manner in Puerto Rico, or (b) failing a sale in Puerto Rico, transship the vehicles to the mainland United States.

19. Any transshipment resulting from SCP's actions would be particularly damaging to MMC. These vehicles were manufactured for sale in Puerto Rico, and accordingly do not have heaters or defoggers. However, under Federal Motor Vehicle Safety Standard 103, 49 C.F.R. 571.103 and 15 USC 1381, 1397 and 1398, it is illegal to sell such vehicles in the mainland United States, and such sales are subject to penalties. Moreover, such sales might have an adverse impact on MMC's share of the quota for imported Japanese vehicles.

Damage to MMC's Warranties and Goodwill

20. Article I(I) of the Sales Procedure Agreement provides, in relevant part:

> "No conditions, representations or warranties, express or implied by law, are made or will be deemed to be made by MMC in respect of Products sold hereunder, except for those provided for in the Service Policy and Warranty Procedure Manual previously delivered to BUYER or any amended or substituted manual adopted by MMC (hereinafter referred to as the Service Policy and Warranty Procedure Manual) in effect on the date of shipment of such Products. . . .
>
> "BUYER shall extend to its Dealers a warranty substantially similar to the warranty extended to it by MMC and cause such Dealers to extend such warranty to retail purchasers of Motor Vehicles. . . ."

21. SCP has not honored its obligations under this provision. In particular, SCP has failed to provide adequate after-sale warranty service to purchasers of MMC vehicles. In this respect, I am informed that since November, 1981, SCP has reduced its service staff from 8 to 2 mechanics. These failures have endangered, and continue to endanger, the goodwill of MMC and the reputation and standing of MMC.

Failure to Obtain Financing

22. Article I(F) of the Sales Procedure Agreement provides as follows:

> "Payment for Products to MMC by BUYER shall be made, unless otherwise agreed upon, by irrevocable, confirmed, without recourse, unrestricted and at sight letters of credit to be opened in favor of MMC through reputable first class banks acceptable to MMC. Such letters of credit shall be valid for at least 120 days after they are opened and shall be opened within 15 days after BUYER's receipt of MMC's acceptance as provided in paragraph D(2) of this Article or by such other earlier date as may be required by MMC. BUYER shall notify MMC promptly of the opening of such letters of credit. If BUYER fails to provide such letters of credit, MMC shall have the option of reselling the contracted goods for BUYER's account, holding the goods for BUYER's account and risk and/or cancelling the Export Sales Contract relating to such goods and claiming for damages caused by BUYER's default."

23. At various times in the past 12 months, SCP has failed to obtain letters of credit in accordance with the terms of Paragraph I(F), and I understand that SCP is unlikely to be able in the future to obtain such letters of credit.

Moreover, as set forth above, on or about February 23, 1982, SCP's bank took possession of approximately 412 MMC vehicles from SCP.

24. By reason of the foregoing, MMC seeks a declaratory judgment (a) that SCP has breached the Sales Procedure Agreement and (b) that SCP would not be able in the future to perform under the Sales Procedure Agreement.

Expiration of Sales Procedure Agreement

25. On or about October 31, 1981, the Distribution Contract expired by its terms, and has not been renewed. Accordingly, pursuant to the terms of Article VII, the Sales Procedure Agreement expired on October 31, 1981.

26. On or about February 22, 1982, at a meeting which I attended, SCP (through its president) orally surrendered its rights, if any, under the Sales Procedure Agreement.

Need for Declaratory Relief

27. A controversy has arisen between MMC and SCP. MMC contends (i) that SCP is not and never has been a dealer of MMC within the meaning of the Puerto Rican Dealer's Act, 10 L.P.R.A. 278, *et seq.*, (ii) that MMC has been discharged from its obligations under the Sales Procedure Agreement by reason of the matters and transactions set forth above, (iii) that the non-renewal of SCP's rights under the Sales Procedure Agreement was in accordance with the terms thereof, and (iv) that MMC had just cause for the non-renewal of SCP's rights under the Sales Procedure Agreement. SCP contends (i) that it either is or formerly was a dealer of MMC, (ii) that it fulfilled the terms and conditions of the Distribution Contract and the Sales Procedure Agreement, and (iii) that MMC is there-

fore liable for the purported impairment of SCP's rights under the Puerto Rico Dealer's Act, 10 L.P.R.A. 278, *et seq.*

The Parties' Arbitration Agreement

28. I respectfully submit that each and every one of MMC's claims and demands is within the scope of the agreement to arbitrate, as is demonstrated by the various provisions of the Sales Procedure Agreement set forth above. The arbitration agreement set forth in Article VI of the Sales Procedure Agreement provides as follows:

> "All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

Because the question of MMC's "just cause" for the nonrenewal of the Sales Procedure Agreement arises out of and relates to those defaults, the prayer for declaratory relief is arbitrable as well.

29. MMC is ready to proceed to arbitration with SCP on the foregoing disputes, and seeks such relief in this action. SCP has failed to seek arbitration and appears unwilling to arbitrate pursuant to the terms and conditions of the Sales Procedure Agreement. Rather, it has stated that it intends to commence litigation, in which it would probably seek *ex parte* injunctive relief against MMC calculated to disrupt its business in Puerto Rico. This Court should enter an order compelling SCP to proceed to honor its contract and preventing the initiation of vexatious litigation.

30. The federal policy favoring arbitration is particularly strong where, as here, international commerce is directly involved. I submit that the only practical means of ensuring that the arbitration agreement is carried out is to enjoin the institution of the other litigation by SCP against MMC.

No Harm to SCP

31. If the requested injunction is granted, SCP will suffer no harm at all. Any claim it might assert against MMC is either (a) subject to the arbitration agreement or (b) a compulsory counterclaim in this action, because all such claims arise out of the same transactions or occurrences as do MMC's claims against SCP.

32. Accordingly, SCP will have access to an appropriate forum for all claims it may wish to assert. No reason is apparent why SCP should be free to frustrate this Court's jurisdiction and create a multiplicity of actions when the intent of the agreement to arbitrate was to provide for a single and efficient remedy to resolve the parties' differences.

33. The lack of any harm to SCP is further demonstrated by the virtual cessation of its business. I understand that since the bank took possession of SCP's inventory, it has been engaged in what is, in effect, a clearance sale of its few remaining vehicles. Moreover, these events followed the oral declaration of SCP's president that SCP would no longer deal in MMC products. Because it is clear that SCP is not carrying on any significant business in MMC Products and is highly unlikely to do so in the future because of its financial collapse, it cannot be harmed by the requested injunction. In effect, SCP has already folded its tent, and accordingly will suffer no damage from the requested injunction.

Irreparable Harm to MMC

34. If the requested injunction is not granted, MMC will be irreparably harmed. If SCP commences one or more actions in the Commonwealth Courts, SCP could be expected to argue that the Anti-Injunction Act, 28 U.S.C. 2283, would bar the relief sought herein. Moreover, because the Commonwealth Courts might determine that the agreement to arbitrate is void, the parties could be confronted with conflicting decisions respecting arbitration. While MMC submits that this Court would have the power to enjoin other proceedings, their very pendency would lend to wasteful jurisdictional litigation and substantial delay in proceeding to arbitration. Such delay is particularly harmful to MMC in light of SCP's perilous financial condition.

35. At a meeting held at SCP's office on February 22, 1982, SCP's president stated that he intended to commence a lawsuit against MMC, and further stated that all further communications should be through SCP's attorneys. Similarly, MMC's attorneys inform me that when they first spoke to Rafael Martinez Alvarez, III, Esq., SCP's attorney, he stated that his client "wants to go to court." All such claims SCP may believe it has against MMC arise out of or relate to the Sales Procedure Agreement, the Distribution Contract or SCP's purported rights as a distributor or dealer of MMC products.

36. MMC's effort to rehabilitate its business in Puerto Rico is now at a very delicate stage. Its outcome depends in large part on the successful sale of the 966 units comprising the Japan Stock and the 412 units surrendered to by the bank. If SCP is not restrained from commencing litigation whose only purpose could be to disrupt this effort, MMC's business in Puerto Rico will be irreparably damaged. Indeed, the mere possibility of such litigation has proved to be an impediment to MMC's negotiations with the other CISA distributors and their banks.

Need For Ex Parte Relief

37. This application has been presented without notice to SCP. Given the ease with which an action can be commenced, even a few hours' telephone notice might lend to precisely the result this motion seeks to avoid, the commencement of multiple litigations between MMC and SCP.

38. I submit that a brief *ex parte* stay will cause absolutely no harm to SCP. MMC is willing to proceed to a hearing (either to extend the temporary restraining order or on the preliminary injunction) upon however brief a schedule the Court fixes. As soon as this Order is entered, MMC will give telephone notice thereof to SCP.

39. For the reasons set forth above, MMC had more than ample "just cause" for ceasing to deal with SCP. Pursuant to the Sales Procedure Agreement, the parties are required to arbitrate this entire dispute. I respectfully submit that this Court should enter a brief *ex parte* stay in order to deny SCP one last chance to be a "dog in the manger" and interfere with MMC's business.

Conclusion

40. For the foregoing reasons, I respectfully request this Court (a) to order SCP to proceed to arbitration with MMC and (b) to enjoin SCP from instituting or prosecuting any other litigation on the same subject matter.

. . . . . .

MITSUAKI MITSUKURI

[Subscribed and sworn
to March 15, 1982]
[Jurat omitted in printing]

[Exhibit A omitted in printing; same as Exhibit A to the Complaint, pages 18-41, *supra.*]

[Exhibit B omitted in printing; same as Exhibit B to the Complaint, pages 42-57, *supra.*]

Request for Arbitration

BEFORE THE
JAPAN COMMERCIAL ARBITRATION ASSOCIATION

In the Matter of the Arbitration between
MITSUBISHI MOTORS CORPORATION,

Plaintiff,

and

SOLER CHRYSLER-PLYMOUTH, INC.,

Defendant.

Mitsubishi Motors Corporation respectfully requsts arbitration pursuant to the rules of the Japan Commercial Arbitration Association, with proof to be by oral testimony and submission of written documents, as follows:

1. Mitsubishi Motors Corporation ("MMC") is a corporation organized and existing under the laws of Japan, with its principal place of business at 33-8, Shiba 5-chome, Minato-ku, Tokyo, Japan.

2. Soler Chrysler-Plymouth, Inc. ("SCP") is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico, with its principal place of business at Carretera No. 2, Km. 6.9, Pueblo Viejo, Guaynabo, Puerto Rico 00657.

3. On or about October 31, 1979, MMC and SCP entered into a written contract providing for, *inter alia,* the arbitration of certain claims (the "Sales Procedure Agreement"). A copy of the Sales Procedure Agreement is annexed hereto as Exhibit A.

4. MMC now requests arbitration of the following claims.

5. SCP is engaged in the sale and distribution in certain areas of Puerto Rico of passenger cars and trucks manufactured or distributed by Chrysler Corporation ("Chrysler"), which products are distributed by Chrysler's wholly-owned subsidiary, Chrysler International, S. A. ("CISA"), through a network of independent distributors and dealers, pursuant to the terms of a written distributorship contract between CISA and SCP dated October 31, 1979 (the "Distribution Contract").

6. Among the products distributed by SCP are certain motor vehicles manufactured by MMC bearing Chrysler and MMC trademarks ("MMC Products").

7. The MMC Products sold by SCP are subject to the terms and conditions of the Sales Procedure Agreement.

Failure to Pay for Ordered Vehicles

8. Pursuant to Article I(B) of the Sales Procedure Agreement, SCP has ordered 966 vehicles, at a total f.o.b. price of $3,526,168, but has failed to pay therefor pursuant to Article I(F). Such vehicles were manufactured at the special instance and request of SCP to the specifications and requirements of SCP.

9. By reason of the foregoing, SCP is indebted to MMC in the amount of $3,526,168, together with interest thereon.

Failure to Pay Distress Unit Penalties

10. Among the terms and conditions set forth in Article I(E) of the Sales Procedure Agreement is the following:

> "If shipment of ordered Motor Vehicles is not made within one month from the end of the month

in which MMC produced such Motor Vehicles due to any reason which is not imputable to MMC, BUYER shall pay MMC a distress unit penalty to compensate MMC for storage costs and interest charges incurred by MMC for keeping such Motor Vehicles in stock in accordance with the Ordering Procedure in effect on the date of such production."

11. Pursuant to the Sales Procedure Agreement, SCP has ordered 966 MMC vehicles which remained unshipped for periods of one month or more. SCP has thereby incurred, as of February 28, 1982, $290,012.58 in distress unit penalties, no part of which has been paid.

12. By reason of the foregoing, SCP is indebted to MMC in the sum of $290,012.58, together with interest thereon.

Damage to MMC's Warranties and Good Will

13. Article I(I) of the Sales Procedure Agreement provides, in part:

"No conditions, representations or warranties express or implied by law, are made or will be deemed to be made by MMC in respect of Products sold hereunder, except for those provided for in the Service Policy and Warranty Procedure Manual previously delivered to BUYER or any amended or substituted manual adopted by MMC (hereinafter referred to as the Service Policy and Warranty Procedure Manual) in effect on the date of shipment of such Products. . . .

"BUYER shall extend to its Dealers a warranty substantially similar to the warranty extended to it by MMC and cause such Dealers to extend such warranty to retail purchasers of Motor Vehicles. . . ."

14. SCP has defaulted in its obligations with respect to such warranties. In particular, SCP has failed to provide

adequate after-sale warranty service to purchasers of MMC vehicles. Such failures have endangered, and continue to endanger, the good will of MMC and the name, reputation and standing of MMC.

15. As a consequence of the foregoing, MMC has been damaged and SCP is liable therefor.

Failure to Obtain Financing

16. Article I(F) of the Sales Procedure Agreement provides as follows:

"Payment for Products to MMC by BUYER shall be made, unless otherwise agreed upon, by irrevocable, confirmed, without recourse, unrestricted and at sight letters of credit to be opened in favour of MMC through reputable first class banks acceptable to MMC. Such letters of credit shall be valid for at least 120 days after they are opened and shall be opened within 15 days after BUYER's receipt of MMC's acceptance as provided in paragraph D(2) of this Article or by such other earlier date as may be required by MMC. BUYER shall notify MMC promptly of the opening of such letters of credit. If BUYER fails to provide such letters of credit, MMC shall have the option of reselling the contracted goods for BUYER's account, holding the goods for BUYER's account and risk and/or cancelling the Export Sales Contract relating to such goods and claiming for damages caused by BUYER's default."

17. On information and belief, at various times in the past 12 months, SCP has been unable to obtain letters of credit in accordance with the terms of Article I(F). Further on information and belief, SCP will not be able in the future to obtain such letters of credit.

18. By reason of the foregoing, MMC is entitled to a declaratory judgment: (a) that SCP has breached the Sales Procedure Agreement; and (b) that SCP would not be able to perform under the Sales Procedure Agreement.

Expiration of Sales Procedure Agreement

19. On or about October 31, 1981, the Distribution Contract expired by its terms, and has not been renewed. Accordingly, the Sales Procedure Agreement expired on by its terms on October 31, 1981.

20. On or about February 22, 1982, SCP orally surrendered its rights, if any, under the Sales Procedure Agreement.

21. A controversy has arisen between MMC and SCP, in respect of which MMC seeks declaratory relief. MMC contends: (i) that SCP is not and never has been a dealer of MMC within the meaning of the Puerto Rico Dealers' Act, 10 L.P.R.A. 278 *et seq.* ("Act 75"); (ii) that MMC has been discharged from its obligations under the Sales Procedure Agreement by reason of the matters and transactions set forth above; (iii) that the non-renewal of SCP's rights under the Sales Procedure Agreement was in accordance with the terms thereof; and (iv) that SCP's rights under the Sales Procedure Agreement were terminated or not renewed with just cause, and that Act 75 has been complied with. SCP contends: (i) that it now is or formerly was a dealer of MMC; (ii) that it has fulfilled the terms and conditions of the Distribution Contract and the Sales Procedure Agreement; and (iii) that MMC is therefore liable for the alleged impairment of SCP's rights under Act 75. This controversy is actual and justiciable.

Arbitration Agreement

22. Article VI of the Sales Procedure Agreement provides as follows:

> "All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

23. Each and every one of the claims and demands set forth above in paragraphs 1 through 22 hereof is within the scope of the above-described agreement to arbitrate.

24. MMC desires to arbitrate all disputes, controversies and differences with SCP.

25. SCP has failed or neglected to arbitrate its disputes, controversies and differences with MMC pursuant to the terms and conditions of the Sales Procedure Agreement.

WHEREFORE, MMC:

(a) requests arbitration between MMC and SCP in accordance with the terms of the Sales Procedure Agreement as set forth above;

(b) demands its costs and disbursements of this arbitration, including MMC's reasonable attorneys' fees, and

(c) seeks such other and further relief as to the arbitration tribunal seems just and proper.

In San Juan, Puerto Rico, this 18th day of March, 1982.

MITSUBISHI MOTORS CORPORATION
By: /s/ [Illegible]
M. Mitsukuri, General Manager
Latin America Group, Office of
International Business

[Affidavit of Service omitted in printing]

[Exhibits omitted in printing]

Answer and Counterclaims

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
Civil No. 82-0538

MITSUBISHI MOTORS CORPORATION,
Plaintiff and Defendant on Counterclaim,

vs.

SOLER CHRYSLER-PLYMOUTH, INC.,
Defendant and Plaintiff on Counterclaim,

vs.

CHRYSLER INTERNATIONAL, S.A.,
Additional Defendant on Counterclaim.

DEFENDANT AND PLAINTIFF ON COUNTERCLAIM DEMANDS TRIAL BY JURY ON ALL ISSUES

ANSWER AND COUNTERCLAIMS

TO THE HONORABLE COURT:

COMES NOW, defendant and plaintiff on counterclaim, Soler Chrysler-Plymouth, Inc. ("Soler"), by its undersigned attorneys, and respectfully states, alleges and prays as follows:

1. With reference to paragraph 1 of the complaint, Soler denies the allegations contained therein except admits plaintiff surports to seek the relief therein mentioned.

2. With reference to paragraph 2 of the complaint, Soler admits, upon information and belief the allegations contained therein.

3. With reference to paragraph 3 of the complaint, Soler admits the allegations of paragraph 3.

4. With reference to paragraph 4 of the complaint, Soler admits that plaintiff purports to invoke the diversity jurisdiction of this Court, but denies that plaintiff has been damaged in excess of the jurisdictional amount of Ten Thousand Dollars ($10,000.00), or any other amount.

5. With reference to paragraph 5 of the complaint, Soler denies the allegations contained therein except admits that plaintiff purports to invoke jurisdiction under the federal statutes referred to therein.

6. With reference to paragraph 6 of the complaint, Soler admits the allegations contained therein.

7. With reference to paragraph 7 of the complaint, defendant Soler admits that it is engaged in the distribution, sale and servicing of cars and trucks manufactured or distributed by Chrysler Corporation and distributed by Chrysler International, S.A. ("CISA"), pursuant to a written Distributor Agreement between CISA and Soler dated October 31, 1979, but denies that such sales and distribution is, or legally could be, limited to the geographical area referred to, and denies knowledge or information sufficient to form a belief as to the extent of Chrysler's ownership of CISA and the existence of the claimed network of irdependent distributors and dealers.

8. With reference to paragraph 8 of the complaint, defendant Soler admits that it has engaged in the distribution, sales and servicing of motor vehicles received by Soler from Mitsubishi, which bore trademarks of Mitsubishi and/or Chrysler.

9. With reference to paragraph 9 of the complaint, defendant Soler denies the allegations contained therein, except admits that it executed with CISA and Mitsubishi a Sales Procedure Agreement dated October 31, 1979, which concerned certain limited aspects of the sale of Mitsubishi products to Soler, but which Sales Procedure Agreement expressly ratified and continued the Distributor Agreement between Soler and CISA.

10. With reference to paragraph 10 of the complaint, defendant Soler denies the allegations contained therein except admits that it requested the shipment of 466 vehicles during the calendar year 1981, and avers that said vehicles were never received by or shipped to Soler, and denies knowledge or information as to the specifications or requirements to which the vehicles were allegedly manufactured, or if in fact they were manufactured at all.

11. With reference to paragraph 11 of the complaint, defendant Soler denies the allegations contained therein.

12. With reference to paragraph 12 of the complaint, defendant Soler admits that the quoted language, among other things, is contained in Paragraph I(E) of the Sales Procedure Agreement, but respectfully refers the Court to the entire agreement for the full content thereof and to the Distributor Agreement, which was made applicable thereto.

13. With reference to paragraph 13 of the complaint, defendant Soler denies the allegations contained therein and avers that in the event any vehicles ordered by Soler from Mitsubishi remained unshipped for a period of one month or more, then the failure to ship same was imputable to the acts of Mitsubishi, and Soler was damaged thereby.

14. With reference to paragraph 14 of the complaint, defendant Soler denies the allegations contained therein.

15. With reference to paragraph 15 of the complaint, defendant Soler admits that the quoted language, among other things, is contained in Paragraph I(I) of the Sales Procedure Agreement, but respectfully refers the Court to the entire agreement for the full content thereof and to the Distributor Agreement, which was made applicable thereto.

16. With reference to paragraph 16 of the complaint, defendant Soler denies the allegations contained therein.

17. With reference to paragraph 17 of the complaint, defendant Soler denies the allegations contained therein.

18. With reference to paragraph 18 of the complaint, defendant Soler admits that the quoted language, among other things, is contained in Paragraph I(F) of the Sales Procedure Agreement, but respectfully refers the Court to the entire agreement for the full content thereof and to the Distributor Agreement, which was made applicable thereto.

19. With reference to paragraph 19 of the complaint, defendant Soler denies the allegations contained therein and avers that at all relevant times it was ready, willing and able to perform its obligations under the Sales Procedure Agreement, except as may have been waived by plaintiff, and specifically advised Mitsubishi of same with respect to the procurement of letters of credit.

20. With reference to paragraph 20 of the complaint, defendant Soler denies the allegations contained therein.

21. With reference to paragraph 21 of the complaint, defendant Soler denies the allegations contained therein and avers that Mitsubishi has attempted to terminate, directly or indirectly, the established relationship between Mitsubishi and Soler and performed acts detrimental to that established relationship and the established relationship between Soler and CISA and has refused, without just cause,

to renew the Sales Procedure Agreement, all in contravention to Mitsubishi's duties and obligations owing to Soler.

22. With reference to paragraph 22 of the complaint, defendant Soler denies the allegations contained therein.

23. With reference to paragraph 23 of the complaint, defendant Soler denies the allegations therein except admits that Mitsubishi purports to create a justiciable controversy by its recital of what it considers to be the contentions of the parties.

24. With reference to paragraph 24 of the complaint, defendant Soler admits that the quoted language is recited in the Sales Procedure Agreement, but denies that said paragraph is applicable to the controversies alleged herein, or that disputes between the parties were agreed to be settled by arbitration, especially where the local law of Puerto Rico was to the contrary.

25. With reference to paragraph 25 of the complaint, defendant Soler denies the allegations contained therein.

26. With reference to paragraph 26 of the complaint, defendant Soler denies knowledge or information sufficient to form a belief as to the truth thereof and avers that Mitsubishi has no right to the relief claimed.

27. With reference to paragraph 27 of the complaint, defendant Soler denies the allegations contained therein except admits that Soler is entitled to an adjudication of its rights and disputes with Mitsubishi and CISA in the Federal and Commonwealth Courts of Puerto Rico.

28. With reference to paragraph 28 of the complaint, defendant Soler repeats its foregoing responses to paragraphs 1 through 27 of the complaint as its response to paragraph 28.

29. With reference to paragraph 29 of the complaint, defendant Soler denies the allegations contained therein except admits that Soler is entitled to an adjudication of its rights and disputes with Mitsubishi and CISA in the Federal and Commonwealth Courts of Puerto Rico.

30. With reference to paragraph 30 of the complaint, defendant Soler denies the allegations contained therein and respectfully refers to the Court all questions of law.

31. With reference to paragraph 31 of the complaint, defendant Soler denies the allegations contained therein.

32. With reference to paragraph 32 of the complaint, defendant Soler denies the allegations contained therein and denies that Mitsubishi is entitled to the relief requested for the reasons stated or otherwise.

AS AND FOR A DEFENSE TO THE COMPLAINT

33. CISA is a corporation formed and existing under the laws of the Swiss Confederation doing business in the Commonwealth of Puerto Rico.

34. CISA is subject to the service of process in the Commonwealth of Puerto Rico and its joinder as a party herein will not deprive the Court of jurisdiction over the subject matter of this action.

35. Plaintiff alleges that its products are sold by defendant subject to the terms and conditions of a Sales Procedure Agreement among plaintiff, defendant and CISA, and that its claims are under and pursuant to said Sales Procedure Agreement.

36. CISA as signatory to the Sales Procedure Agreement should be a party to this action, and plaintiff's failure to join CISA will not permit complete relief to be accorded

between plaintiff and defendant, and any proceeding, whether this action or arbitration, should not be permitted to proceed in the absence of CISA.

As and for a Defense to the Complaint and a First Affirmative Counterclaim for Relief Against Mitsubishi and Chrysler International, S.A.

37. This claim arises under Act. No. 75, approved on June 24, 1964, 10 LPRA 278, *et seq.*

38. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

39. On October 31, 1979 Soler and CISA entered into a Distributor Agreement under which CISA granted to Soler the right to purchase automotive products for resale, a copy of which agreement is incorporated by reference and made a part hereof as Exhibit "A".

40. Although it was agreed in paragraph 22 of such agreement that the same would be construed in accordance with the laws of the Swiss Confederation, the parties also agreed therein that in the event any part of the agreement would be contrary to any law of Puerto Rico, such portion or portions of the agreement would be of no force and effect, the same to be treated as if such portion or portions had not been inserted therein, and thus, in effect, agreed that local law would prevail if the same was contrary to any portion of the agreement.

41. Moreover, under paragraph 26 of such contract, CISA and Soler agreed that CISA, at its option, could forward orders received from Soler to any associated or

affiliated company who would then sell directly to Soler, such direct sales to be governed by the order form of the Supplier and by the Distributor Agreement with CISA.

42. It was further agreed between such parties that " . . . any claim or controversy resulting from such direct sales by Supplier will be handled by Chrysler (CISA) as though such sales had been made by Chrysler (CISA)."

43. Pursuant to mentioned Article 26 of the Distributor Agreement, CISA, Mitsubishi an affiliate of CISA, and Soler, on or about October 31, 1979, executed an agreement known as Sales Procedure Agreement, " . . . with respect to the terms and conditions applicable to such direct sales . . . " to which extent the Distributor Agreement heretofore referred was modified.

44. Mitsubishi has refused to comply with the terms and conditions of the Sales Procedure Agreement concerning orders placed for delivery of automobile products to Soler.

45. Mitsubishi has informed Soler that CISA has also refused, without just cause, to continue its Distributor Agreement with Soler, taking the posititon that the same expired on its own terms on October 31, 1981, contrary to the provisions of Section 2 of Act 75, *supra,* 10 LPRA 278(a).

46. As a consequence of the aforementioned facts, Soler has sustained damages amounting to at least $10,000,000 for: the actual value of the amount expended in its premises for equipment, installation, furniture, and utensils; the cost of automobile products, parts, and accessories in stock; the good will of Soler's business after having been established in the sales area described in the Distributor Agreement and having sold Mitsubishi automobiles and related products for over two years, having an actual volume of gross

sales amounting to some $30,000,000 per year, which represents approximately 55% of the Puerto Rican market of Mitsubishi cars sold through Chrysler-Plymouth distributors, plus profits in the distribution of Mitsubishi automobiles and related products.

47. In addition to the relief requested, it is also requested that this Honorable Court issue an injunction decree, in accordance with the provisions of Section 3-A of Act No. 75 of January 24, 1964, as amended by Act No. 17 of May 24, 1971, 10 LPRA 278(b), ordering both CISA and Mitsubishi, their attorneys-in-fact, assigns, agents, representatives, and/or employees, to continue, during the proceedings of this case, the relationship established with Soler through the Distributor Agreement signed on October 31, 1979; and/or abstain from any act or omission in detriment thereof; and further ordering CISA to fill and honor with current automotive products the orders received from Soler for Mitsubishi vehicles, parts and accessories, under the same prices, terms and conditions which, according to invoices, have been granted to Soler.

48. Counterclaim Soler respectfully requests from this Honorable Court that judgment be entered, ordering counter-defendants CISA and Mitsubishi to pay to Soler the amount claimed of at least $10,000,000.00 as compensation for the damages caused by the breach of the Distributor Agreement and that will continue to be caused to Soler; granting the injunctive relief requested, and for costs, expenses and attorneys' fees incurred in this case.

AS AND FOR A DEFENSE TO THE COMPLAINT AND A SECOND AFFIRMATIVE COUNTERCLAIM AGAINST MITSUBISHI AND CHRYSLER INTERNATIONAL, S. A.

49. This claim arises under the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221, *et seq*.

50. Defendant and plaintiff on counterclaim, Soler, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Puerto Rico, with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico, and is an "automobile dealer" as defined in 15 U.S.C. § 1221(c).

51. Upon information and belief, defendant on counterclaim, CISA, is a corporation organized and existing under the laws of the Swiss Confederation, with its principal place of business in Geneva, Switzerland. CISA is a wholly owned subsidiary of Chrysler Corporation, and sells to distributors, such as Soler, automobiles manufactured by Chrysler Corporation and Mitsubishi, and, as such is an "automobile manufacturer" under 15 U.S.C. § 1221(a).

52. Plaintiff and defendant on counterclaim, Mitsubishi, is an "automobile manufacturer" for the purposes of the Automobile Dealers' Day in Court Act, as defined in 15 U.S.C. § 1221(a).

53. Mitsubishi and CISA are engaged in "commerce" as defined in 15 U.S.C. § 1221(d).

54. On or about October 31, 1979, CISA and Soler entered into a written agreement whereby CISA agreed to grant to Soler a franchise as an authorized Chrysler-Plymouth dealer and distributor, in consideration of the mutual promises and agreements entered into by the parties in the aforesaid agreement entitled as a Distributor Agreement and annexed as Exhibit "A".

55. The above-mentioned Distributor Agreement, and the Sales Procedure Agreement discussed below, constitute a "franchise" as defined in and for the purposes of 15 U.S.C. § 1221(b).

56. To induce Soler to enter into the Distributor Agreement, CISA agreed to supply Soler with low-priced eco-

nomical automobiles for sale to the public by Soler. The availability for sale to the public through Soler of such type automobiles was of the essence of the agreement and a motivating factor in Soler's decision to become a dealer and distributor of CISA.

57. In truth and fact, CISA, and its parent corporation, Chrysler Corporation, did not manufacture the low priced economical automobiles which Soler desired to sell through its franchise in Puerto Rico, but assured Soler, both in the Distributor Agreement and otherwise, that such automobiles would be supplied to Soler under the established Chrysler-Plymouth name and insignia, even though such automobiles were manufactured not by Chrysler Corporation or its subsidiaries, but by Mitsubishi of Tokyo, Japan with whom CISA claimed to be affiliated.

58. In furtherance of the commitment by CISA to supply Soler with low priced economy automobiles, it was agreed in the Distributor Agreement that CISA, at its option, could forward orders received from Soler to any associated or affiliated company, such as Mitsubishi, who would then sell directly to Soler, such direct sales to be governed by the order form of the Supplier and by the Distributor Agreement with CISA.

59. It was further agreed by the parties that "any claim or controversy resulting from such direct sales by Supplier [Mitsubishi] will be handled by Chrysler (CISA) as though such sales had been made by Chrysler (CISA)."

60. Pursuant to Article 26 of the Distributor Agreement, CISA, Mitsubishi and Soler executed on or about October 31, 1979 a "Sales Procedure Agreement" which by its terms modified the Distributor Agreement "with respect to the terms and conditions applicable to such direct sales", but otherwise ratified the Distribution Agreement.

61. In the Sales Procedure Agreement, in Article XII thereof, Mitsubishi agreed not to take any action inconsistent with the provisions of the previously mentioned Distributor Agreement entered into between CISA and Soler.

62. In reliance upon the granting by CISA of a distributor and dealer franchise for the aforesaid automobiles, and especially for the low priced economy cars to be supplied by CISA through direct sales by Mitsubishi, Soler undertook to purchase the business of a former CISA dealer and distributor in Puerto Rico, known as Atlantic Performance Cars Corp.

63. Soon after the purchase by Soler of the assets of Atlantic Performance Cars Corp. and the signing of the aforesaid Distributor Agreement, Soler opened for business in Puerto Rico as an authorized Chrysler-Plymouth dealer, selling, among other things, the Plymouth "Champ" and "Sapporo" and other economy type cars manufactured by Mitsubishi in Tokyo, Japan, but sold to Soler, and in turn to the public, as Chrysler Corporation automobiles.

64. In order to promote and develop its dealership and distributorship of Chrysler-Plymouth and Mitsubishi vehicles, Soler expended large sums of money in furtherance of CISA's and Mitsubishi's interests and created a demand and a market for the vehicles they supplied.

65. Soler duly performed all the terms and obligations on its part to be performed under the Distributor Agreement and Sales Procedure Agreement, except as same may have been waived or modified by CISA and/or Mitsubishi.

66. By reason of such efforts, Soler established a large and profitable business. In particular during the 1980 model year for Mitsubishi automobiles, Soler was expected

to sell 1,922 Mitsubishi automobiles pursuant to a letter agreement with CISA, Soler and Mitsubishi signed on or about October 31, 1979.

67. At the end of the 1980 model year, Mitsubishi advised Soler that it had exceeded the minimum sales volume established by Mitsubishi by some 211% and had in fact sold 4,206 Mitsubishi vehicles, thus exceeding by 2,214 vehicles the minimum sales volume established by Mitsubishi for Soler.

68. By reason of the foregoing and other efforts made by Soler, it was able to establish a large and profitable distributorship and dealership business, and attracted many steady and satisfied dealers and customers, thereby establishing substantial and valuable good will, and thereby substantially enhancing the goodwill, market penetration and reputation of the Chrysler-Plymouth and Mitsubishi businesses and products.

69. CISA and Mitsubishi have contended that the Soler franchise was automatically terminated effective October 31, 1981. No notice of any such purported termination was given to Soler at or about said time, nor did any good faith grounds or just cause for termination of the franchise exist at that or any subsequent time.

70. The aforesaid contention that the franchise was automatically terminated effective October 31, 1981 was and is made by Mitsubishi in contradiction to the laws of the Commonwealth of Puerto Rico (10 LPRA § 278 *et seq.*), which by necessary implication is part of the terms of the franchise agreements between the parties.

71. The attempt to terminate Soler's franchise was without cause and taken without the exercise of good faith. Said attempt at termination was arbitrary, wrongful and

in breach of the franchise agreements between the parties and in violation of 12 U.S.C. §§ 1221, 1222.

72. In addition, during the term of the franchise dealer contracts, the defendants on counterclaim failed to act in good faith in performing or complying with the terms and provisions of said franchises, in violation of the Automobile Dealer's Day in Court Act (15 U.S.C. §§ 1221 *et seq.*).

73. More specifically, CISA has failed to act in good faith with Soler to handle claims or controversies resulting from direct sales from Mitsubishi to Soler; has precluded Soler from selling cars to available buyers; has considered solely its interests and its relationship with Mitsubishi in its dealings with Soler; has failed to supply sufficient economy automobiles to Soler in breach of the Distributor Agreement; has participated in Mitsubishi's scheme to destroy Soler's franchise as a distributor; has coerced and intimidated Soler so as to further the interests of Mitsubishi, CISA and Chrysler; has failed to deal with Soler in a fair, legal and honest fashion, and has allowed other distributors and/or dealers in Puerto Rico to wrongfully infringe upon the franchise and market it granted to Soler in Puerto Rico, as a result of which Soler has been damaged in its business, sales and reputation.

74. More specifically, Mitsubishi has also failed to act in good faith with Soler regarding orders by Soler for 1981 and 1982 cars manufactured by Mitsubishi. In this regard, Mitsubishi has failed to act in good faith in establishing minimum sales volumes for Soler, in failing to respond to requests by Soler for shipment of cars necessary to meet same, and in treating Soler in a discriminatory and prejudicial manner as respects its treatment of other CISA distributors in Puerto Rico, and in allowing and promoting sales of cars in infringement of the franchise and market granted to Soler in Puerto Rico.

75. In addition, Mitsubishi has coerced and intimidated Soler by purporting to make offers of assistance to Soler and failing to carry through same, by thereafter acting in a manner intended to diminish and eventually destroy Soler's business, and in then attempting to wrongfully appropriate for itself the market and distributorship which Soler developed through its efforts in Puerto Rico.

76. Mitsubishi has further failed to act in good faith by failing to ship to Soler the very cars for which it now claims payment and at the same time claiming that Soler's alleged failure to sell said cars has resulted in purported just or good cause for termination of the franchise.

77. Mitsubishi has obstructed efforts by Soler to sell cars in available markets and, specifically, the same cars for which Mitsubishi now seeks payment; has induced CISA to participate in such obstruction of sales, and has refused to ship cars to or for Soler on the purported grounds that it objected to the intended resale market for such cars, but refused to permit the ordering or installation of routine automobile options such as heaters or defoggers to alleviate such objections.

78. Mitsubishi wrongfully refused to honor warranty claims for reimbursement to Soler, delayed payments to Soler of such reimbursement with the knowledge of Soler's need for such funds, and failed to honor factory authorized rebate claims submitted by Soler.

79. Upon information and belief, Mitsubishi attempted to interfere in 1981 with a proposed sale by Soler of its franchise to World Cars International, conducted *ex parte* negotiations with the proposed buyer without notice to or consent from Soler, and advised Soler in January, 1982 that World Cars International would no longer be interested in the purchase of Soler's distributorship.

80. In detriment to Soler's business and good will in Puerto Rico, Mitsubishi has advised the public that Soler is no longer its automobile dealer and distributor, and has directed sales and service to other distributors in Puerto Rico.

81. The aforesaid acts and breaches of contract by CISA and Mitsubishi have damaged Soler in its business, sales, good will and reputation.

82. By virtue of the foregoing, Mitsubishi and CISA are liable to Soler for compensatory damages in the amount of at least $10,000,000 and an award of $100,000,000 in exemplary and punitive damages is warranted in the circumstances, plus interest, costs, disbursements and reasonable attorneys' fees.

As and for a Defense to the Complaint and a Third Affirmative Claim for Relief Against Mitsubishi and CISA

83. This claim arises under the Sherman Antitrust Act and the Clayton Act, 15 U.S.C. § 1 *et seq*. Jurisdiction and venue within this district is proper under 28 U.S.C. 1391(b) and under 15 U.S.C. §§ 15 and 22.

84. Defendant and counterclaimant, Soler, hereby repeats and realleges each and every allegation of paragraphs "39" through "45" and "50" through "80", inclusive.

85. Beginning in or about at least June of 1981, the exact date being unknown to Soler, Mitsubishi and CISA engaged in an unlawful combination and conspiracy to restrain and divide markets in interstate and foreign commerce, in violation of the Sherman Antitrust Act and the Clayton Act. This unlawful combination, conspiracy and attempt to restrain trade and divide markets has consisted of continuing agreements and concerts of action whereby:

(a) Mitsubishi presently claims a balance due from Soler of over $3.5 million dollars for some 966 cars. With respect to these same vehicles, Mitsubishi refused to allow Soler to sell these cars to buyers in North, Central or South America, while at the same time claiming that Soler was obligated to sell the cars at the peril of losing its franchise in Puerto Rico and incurring so-called distress unit penalties.

(b) Soler and other CISA distributors in Puerto Rico arranged to sell part of the 966 vehicles to Chrysler dealers, distributors and other buyers in the United States in order to alleviate their worsening financial condition which resulted from the aforesaid acts of Mitsubishi.

(c) Realizing that the sale set forth in (b) above would enhance the prospects for the continued viability of Soler's business in Puerto Rico, Mitsubishi refused to permit the sales to the aforesaid buyers, thereby lessening the availability of vehicles for purchase in competitive markets.

(d) Mitsubishi and CISA agreed in 1981 and early 1982 that Mitsubishi vehicles ordered by CISA distributors in Puerto Rico would not be allowed to be resold outside of Puerto Rico. To this end, Mitsubishi refused to supply routine automotive options, such as heaters and defoggers, to Soler for installation on the aforementioned cars, and refused to have these options installed in Japan; at the same time insisting it had purportedly manufactured the cars to Soler's specifications and that the cars would have to be sold in Puerto Rico.

(e) Mitsubishi and CISA agreed to divide the markets of the United States and Puerto Rico among themselves with respect to the sale of Mitsubishi cars manufactured for sale through distributors and dealers affiliated with Chrysler Corporation or its subsidiaries. To this end, CISA advised

Soler that it would not allow the sale to United States Chrysler dealers or distributors, or other buyers, of vehicles manufactured by Mitsubishi for Soler. Mitsubishi and CISA advised Soler that they had internally agreed upon a quota system for the markets they had divided amongst themselves and would not allow Soler to purportedly upset their internal arrangements by selling cars to markets they had already agreed upon.

(f) In furtherance of the aforesaid conspiracy, Mitsubishi and CISA boycotted Soler and refused to ship to Soler heaters or defoggers for installation on the vehicles, or to install same themselves, and refused to ship to Soler the vehicles which Soler had requested and which it stood ready to pay for.

(g) In furtherance of the aforesaid conspiracy, CISA and its parent, Chrysler Corporation, advised Soler that Soler would be obligated to honor warranty service claims for cars arriving from the United States to Puerto Rico, but that if any of Soler's cars should be sold in the United States, Chrysler dealers in the United States would not honor warranty service claims for any of the Soler vehicles.

86. These foregoing acts, and other acts committed by CISA and Mitsubishi, were committed with the purpose and effect of preventing and reducing competition in the United States and Puerto Rican market for Japanese economy cars, and were done with the purpose of eliminating Soler as a competitor and destroying his goodwill and business.

87. When Soler indicated that it would not acquiesce in the foregoing territorial restrictions and attempted to attract buyers who were located outside of Puerto Rico for some of the 966 cars as to which Mitsubishi claims payment,

Mitsubishi coerced both Soler and its bank to desist from such attempts, threatening unspecified legal and other action, and enlisted the participation of CISA in pressuring Soler not to attempt to purportedly disrupt certain unspecified arrangements between CISA and Mitsubishi, and arrangements between Mitsubishi and the government of Japan, which, upon information and belief, were designed to perpetrate the aforesaid quotas, division of markets, and restraint of trade.

88. As a part of the foregoing conspiracy to restrict markets for the sale by Soler of its vehicles, Mitsubishi refused to ship to or for Soler any of the vehicles mentioned in its complaint and refused to supply Soler with vehicles Soler had ordered to meet its 1981 minimum sales volume, and refused to supply it with any 1982 model vehicles. As a proximate result of all the foregoing actions, competition was lessened in the market for Japanese economy cars in the United States, Puerto Rico, and Central and South America, and buyers for these vehicles were deprived of the opportunity of obtaining same at competitive prices; all to the injury of Soler, its business and goodwill, Soler being forced to compete wtih distributors and dealers of other Japanese automobile manufacturers who did not prohibit the above-mentioned competitive practices, which Mitsubishi and CISA insisted Soler refrain from.

89. As a further part of the aforesaid conspiracy, Mitsubishi sought to attempt to terminate Soler's franchise in Puerto Rico and proposed to install its own wholly-owned subsidiary as exclusive distributor for Mitsubishi cars in Puerto Rico. Mitsubishi attempted to coerce Soler into accepting this proposal (to limit competition in Puerto Rico) by advising Soler that if it accepted the proposal, Mitsubishi would dispose of the 966 cars on its own, but,

necessarily, if the proposal was not accepted, Soler would supposedly be held responsible for the full purchase price of the 966 cars allegedly manufactured and located in Japan, despite Mitsubishi's refusal to ship same to Soler. Soler refused to accept the aforesaid proposal by Mitsubishi.

90. By the commencement of this action, and without any prior notice, Mitsubishi has informed Soler that its Distributor Agreement with CISA and its Sales Procedure Agreement with CISA and Mitsubishi have been terminated. Mitsubishi and CISA have no plausible explanation for their boycotting of Soler and their refusal to deal with Soler, which purchased and paid for many millions of dollars of Mitsubishi and CISA products and has been in the automobile business since the mid-1960's, and been a distributor and dealer of the defendants on counterclaim since 1979.

91. Upon information and belief, the alleged termination of Soler's franchise was carried out because Soler objected to and refused to adhere to the aforesaid unlawful practices which CISA and Mitsubishi sought to impose, and because Mitsubishi, with the knowledge and acquiescence of CISA, sought to usurp the market of Puerto Rico for its own self-controlled entities.

92. The attempted termination of Soler's distributorship and dealer contracts and the destruction of Soler's business has caused it great injury to its goodwill, profits, reputation and relationship with past and potential customers, and has caused injury to the public due to the lessening of competition in the United States and Puerto Rican market areas, and elsewhere, which competition is sought to be suppressed by defendants on counterclaim.

93. As a direct result of the above-described unlawful acts by Mitsubishi and CISA, Soler has already suffered and will continue to suffer, substantial damages.

94. The arbitration sought by Mitsubishi cannot resolve the above claims and would be contrary to the public policy of the United States and Puerto Rico.

95. By virtue of the foregoing, Soler has been damaged by Mitsubishi and CISA in an amount of at least $10,000,000 as to which Soler is entitled to treble damages under the Clayton Act, plus costs, disbursements, interest and counsel fees.

As and For a Defense to The Complaint and Fourth Affirmative Counterclaim Against Mitsubishi

96. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

97. In the year 1981 negotiations were proceeding between Soler and Word Cars International ("WCI") for the sale of defendant's then existing physical plant and distributorship for an amount in excess of $2,000,000.00.

98. Unbeknownst to defendant, at or about that time plaintiff communicated with WCI, and, upon information and belief, plaintiff disparaged, defamed, libeled and slandered defendant's good name and business reputation resulting in WCI terminating its negotiations with defendant all to defendant's damage.

99. By reason of the foregoing, Mitsubishi is liable to Soler for an amount in excess of $2,000,000 in compensatory damages which Soler could have realized on the sale to WCI, together with punitive and exemplary damages in the amount of $20,000,000.

As and For a Defense to The Complaint and Fifth Affirmative Counterclaim Against Mitsubishi

100. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00 exclusive of interest and costs.

101. Plaintiff has heretofore represented and repeated that representation in its complaint herein that in 1981 it manufactured 966 cars to be shipped to Soler for distribution, sales and servicing, which cars were not shipped allegedly because of Soler's inability to make payment for same.

102. At all times Soler remained ready, willing and able to perform its obligations under the Sales Procedure Agreement to arrange for payment for the cars it requested be shipped.

103. Plaintiff knew at all relevant times that it did not intend to act in accordance with its prior representations when made.

104. Despite plaintiff's representations that cars that were ordered would be shipped, despite plaintiff's obligations under and pursuant to its contract with Soler and the obligations imposed on plaintiff by law, and despite Soler's repeated requests in 1981 for shipment of the cars to it, plaintiff failed and refused to ship the cars ordered.

105. Soler, in reliance upon plaintiff's prior representations that cars as requested would be shipped to Soler, expended considerable expense in furnishing and maintaining its physical plant for the purpose of distribution, sale

and servicing of plaintiff's cars. Plaintiff knowingly withheld from Soler the cars it requested be shipped, despite plaintiff's representations to the contrary.

106. By reason of the foregoing, Soler has been damaged in an amount of at least $10,000,000, and plaintiff Mitsubishi is liable to Soler for compensatory damages of at least $10,000,000 together with punitive and exemplary damages in the amount of $100,000,000.

As and for a Defense to the Complaint and Sixth Affirmative Counterclaim Against Mitsubishi

107. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

108. In support of plaintiff's application for a temporary restraining order herein, plaintiff submitted the affidavit, sworn to the 15th day of March, 1982, of Mitsuaki Mitsukuri, the General Manager of plaintiff's Latin America Group.

109. Said affidavit, in paragraph "27" thereof, states in part "I respectfully submit that this Court should enter a brief *ex parte* stay in order to deny SCP [Soler] one last chance to be a 'dog in the manger' and interfere with MMC's [Mitsubishi's] business."

110. Said statement set forth in the affidavit was not relevant, material or pertinent to the issues in this action nor to the issues on plaintiff's application and was stated and published willfully, falsely and maliciously with the intent to injure and defame Soler.

111. Further, in April, 1982, and possibly at other times presently unknown to Soler, plaintiff through its agents, representatives or employees has orally advised the public in Soler's market area and Soler's customers that Soler's established relationship with Mitsubishi had been terminated by Mitsubishi, that Soler was no longer authorized to perform warranty work or otherwise conduct business in connection with Mitsubishi products, that the consuming public and Soler's customers should not utilize the services of Soler but take their business to Soler's competitors, whom Mitsubishi was deferentially and prejudicially favoring.

112. By reason of the foregoing, Soler's standing, reputation, prestige and credit and its business and property as a distributor of Mitsubishi and Chrysler cars and automotive products have been ruined and destroyed with consequent total loss of Soler's good will and patronage and of the value of numerous contracts entered into by Soler in connection with its business.

113. By reason of the foregoing, Mitsubishi is liable to Soler for compensatory damages in the sum of at least $10,000,000 and punitive and exemplary damages in the amount of $100,000,000.

As and for a Defense to the Complaint and Seventh Affirmative Counterclaim

114. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

115. Mitsubishi failed to fulfill its obligations under and pursuant to the Sales Procedure Agreement with Soler

by, among other things, intentionally refusing to ship cars ordered and requested by Soler, by failing to make timely payment of monies due Soler for warranty work performed with the knowledge of Soler's need for such funds, by failing to timely reimburse Soler for authorized rebates on sales of cars with the knowledge of Soler's need for such funds, by failing to act in good faith in establishing minimum sales volumes, in treating Soler in a discriminatory and prejudicial manner as respects its treatment of other CISA distributors in Puerto Rico and in allowing and promoting sales of cars in infringement of the franchise and market granted to Soler in Puerto Rico, all to the detriment of Soler's established relationship with Mitsubishi and all to the detriment of Soler's established relationship with CISA.

116. The above-referred to acts of Mitsubishi were all done without legal justification and maliciously, with the intent to cause the continued existence of Soler to be placed in financial jeopardy, with the result that Soler would not be able to remain in operation thus permitting Mitsubishi to attempt to usurp Soler's position by establishing its own self-controlled distributorships in the market of Puerto Rico.

117. By reason of the foregoing, Soler's standing, reputation, prestige and credit and its business and property as a distributor of Mitsubishi and Chrysler cars and automotive products have been ruined and destroyed with consequent total loss of Soler's good will and patronage and of the value of numerous contracts entered into by Soler in connection with its business.

118. Soler has been prevented from continuing and improving its business and standing in its commercial endeavors, and has been subjected to great expense and annoyance in seeking to protect itself, its business and its property against the foregoing acts and interferences all to plaintiff's

damage in the sum of at least $10,000,000, and Mitsubishi is liable to Soler for compensatory damages in the sum of at least $10,000,000 and punitive and exemplary damages in the amount of $100,000,000.

As and for a Defense to the Complaint and Eighth Affirmative Counterclaim

119. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

120. Pursuant to its agreements with Mitsubishi and CISA, Soler undertook to perform warranty service work on cars manufactured by Mitsubishi and also participated in rebate sales programs authorized by Mitsubishi.

121. Despite due demand, Mitsubishi has failed to pay Soler for the value of the warranty service work and reimburse Soler for the rebates extended by Soler on behalf of Mitsubishi, all despite Mitsubishi's agreement to compensate Soler for same.

122. By virtue of the foregoing, Mitsubishi breached its agreement with Soler and is indebted to Soler in an amount exceeding $10,000.00, the exact amount to be fixed by the jury at trial.

As and for a Defense to the Complaint and Ninth Affirmative Counterclaim Against Mitsubishi and Chrysler International, S. A.

123. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332, there being complete diversity of citizenship between all parties, and

the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

124. Defendant and counterclaimant, Soler, hereby repeats and realleges each and every allegation of paragraphs "39" through "45", "50" through "80", and "85" through "94", inclusive.

125. The aforementioned acts and practices of Mitsubishi and CISA also constitute unfair methods of competition, unfair or deceptive acts or practices in trade or commerce and are unlawful, or otherwise illegal, under 10 LPRA § 257 *et seq*.

126. As a direct result of the above-described unlawful and illegal acts by Mitsubishi and CISA, Soler has already suffered and will continue to suffer, substantial damages.

127. The arbitration sought by Mitsubishi cannot resolve the above claims and would be contrary to the public policy of the United States and Puerto Rico.

128. By virtue of the foregoing, Soler has been damaged by Mitsubishi and CISA in amount of at least $10,000,000 as to which Soler is entitled to treble damages under 10 LPRA § 268 plus costs, disbursements, interest and counsel fees, and injunctive relief under 10 LPRA § 269 (a) to prevent losses or damages to the business and property of Soler.

WHEREFORE, defendant and plaintiff on counterclaim, Soler Chrysler-Plymouth, Inc., respectfully demands judgment be rendered as follows:

(a) dismissing the plaintiff's complaint in all respects;

(b) denying the request by plaintiff that defendant be compelled to submit to arbitration in Japan, and staying

plaintiff's demand for arbitration pending resolution of the counterclaims asserted by defendant, Soler; and

(c) granting Soler judgment on its counterclaims against Mitsubishi and/or Mitsubishi and CISA as requested in said counterclaims for the amounts set forth therein; and for injunctive relief as requested in the first affirmative counterclaim, together with interest, costs and disbursements and reasonable attorneys' fees.

San Juan, Puerto Rico, this 7th day of May, 1982.

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By: /s/ BENJAMIN RODRIGUEZ-RAMON
Benjamin Rodriguez-Ramon

[Certificate of Service omitted in printing]

Motion for Stay and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

To the Honorable Court:

Defendant and plaintiff on counterclaim Soler Chrysler-Plymouth, Inc. ("Soler"), upon the annexed affidavit and the exhibits attached thereto, and upon all prior pleadings and proceedings heretofore had herein, respectfully moves this Court for an order pursuant to Federal Rule of Civil Procedure 65, staying and enjoining plaintiff, Mitsubishi Motors Corporation ("Mitsubishi") from taking any further steps or proceedings to compel Soler to submit to arbitration in Japan pending the determination of Mitsubishi's prior motion, made herein on March 15, 1982, and argued and submitted to the Court on April 30, 1982 together with Soler's return on said motion.

In San Juan, Puerto Rico, on this 7th day of May, 1982.

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By: /s/ BENJAMIN RODRIGUEZ-RAMON
Benjamin Rodriguez-Ramon

[Certificate of Service omitted in printing]

Affidavit of Benjamin Rodriguez-Ramon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

Benjamín Rodríguez-Ramón, being duly sworn, deposes and says:

1. I am a member of Rodríguez-Ramón, Peña & Cancio, attorneys for defendant and plaintiff on counterclaim Soler Chrysler-Plymouth, Inc. ("Soler").

2. I make this affidavit in support of Soler's application for an order that plaintiff and defendant on counterclaim Mitsubishi Motors Corp. ("Mitsubishi") be stayed and enjoined from taking any further steps or proceedings to compel Soler to submit to arbitration in Japan pending the determination of Mitsubishi's application before District Judge Gierbolini. Mitsubishi's motion, dated March 15, 1982, seeks to enjoin Soler from commencing any action in the courts of the Commonwealth of Puerto Rico, or any Federal or state court under Puerto Rico's Act No. 75, approved on June 24, 1964, 10 LPRA 278 *et seq.* and as amended, or otherwise, and further seeking to compel Soler to submit to arbitration.

3. Mitsubishi's aforesaid motion has been responded to by Soler, and Soler's return on the motion has been served and duly filed with the court on April 30, 1982.

4. In addition thereto, Soler's answer and counterclaims to the complaint of Mitsubishi has been served and filed with the court on May 7, 1982. A copy of Mitsubishi's complaint is annexed hereto as Exhibit "A". A copy of Soler's answer and counterclaims is annexed hereto as Exhibit "B".

5. On April 30, 1982, deponent was served in Court with a "Request for Arbitration" in Japanese and in an

uncertified English translation by the attorneys for Mitsubishi. A copy of the "Request" is annexed hereto in Japanese as Exhibit "C", and the translation of same served by the attorneys for Mitsubishi is annexed hereto as Exhibit "D".

6. The court will note from the annexed Exhibit "D" that the issues set forth in the "Request" are substantially identical to the issues set forth in Mitsubishi's prior motion and in its complaint. The validity and propriety of the "Request" is therefore dependant upon the validity of Mitsubishi's claims heretofore made.

7. In the event Mitsubishi's motion is denied in whole or in part, the "Request" will necessarily be found to be improper and invalid in whole or in part.

8. By reason of the foregoing, it is respectfully submitted that in the interests of judicial economy, as well as in the interests of saving time, cost and expense to the parties herein, mandates that Mitsubishi be stayed and enjoined from taking any further steps or proceedings towards compelling Soler to submit to arbitration in Japan pending the determination of Mitsubishi's aforementioned motion.

9. It is further submitted that, in the circumstances, Soler seeks the instant relief as it has no adequate remedy at law.

WHEREFORE, it is respectfully requested that the Court issue an order staying and enjoining Mitsubishi from taking any further steps or proceedings seeking to compel Soler to submit to arbitration pending the Court's determination of Mitsubishi's motion argued and submitted to the Court on April 30, 1982.

San Juan, Puerto Rico, this 7th day of May, 1982.

/s/ BENJAMIN RODRIGUEZ-RAMON
Benjamin Rodriguez-Ramon

[Subscribed and sworn
to May 7, 1982]

[Jurat omitted in printing]

Supplemental Motion to Motion for Stay and Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

TO THE HONORABLE COURT:

COMES NOW, defendant and plaintiff on counterclaim, Soler Chrysler-Plymouth, Inc. ("Soler"), by its undersigned attorneys, and respectfully states, alleges and prays:

1. On May 7, 1982, Soler filed a Motion for Stay and Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65, requesting that plaintiff, Mitsubishi Motors Corporation ("Mitsubishi"), be stayed and enjoined from taking any further steps or proceedings to compel Soler to submit to arbitration in Japan, pending the determination of this Honorable Court, of Mitsubishi's motion dated March 15, 1982, which was argued and submitted for consideration on April 30, 1982, together with Soler's return on said motion.

2. After the filing by Soler of said Motion for Stay and Preliminary Injunction, Notice of Acceptance of Request for Arbitration from The Japan Commercial Arbitration Association was received. A copy of the same in Japanese language, and an English translation thereof, is attached and made a part of this motion as Exhibit 1.

3. On said Notice of Acceptance of Request Soler is directed to submit a written answer to The Japan Commercial Arbitration Association relating to the request for arbitration made by Mitsubishi, as well as to agree as to the place of arbitration and appointment of arbitrator, within the specific terms set forth therein.

WHEREFORE, defendant and plaintiff on counterclaim, Soler, respectfully supplements its Motion for Stay and Preliminary Injunction submitted on May 7, 1982, and requests that an order pursuant to the Federal Rule of Civil Procedure 65 be entered staying and enjoining plaintiff, Mitsubishi, from taking any further steps or proceedings to compel Soler to submit to arbitration in Japan, in order to preserve the jurisdiction of this Honorable Court and the integrity of the judicial proceedings herein.

In San Juan, Puerto Rico, this 11th day of May, 1982.

RODRIGUEZ-RAMON, PENA & CANCIO
P. O. Box "SS"
Hato Rey, Puerto Rico 00919
Telephone (809) 754-6670

JEROME MURRAY
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New York City, New York 10048
Telephone (212) 775-9080
Attorneys for Defendant and Plaintiff
on Counterclaim

By: BENJAMIN RODRIGUEZ-RAMON
Benjamin Rodriguez-Ramon

[Certificate of Service omitted in printing]

Exhibit 1 to Supplemental Motion

[TRANSLATION]

THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION

[Letterhead omitted]

57 Chute No. 036
April 28, 1982

Mr. Tohru Motobayashi
Attorney for Mitsubishi Motors Corporation

Mr. Joaquin Soler, Jr.
President
Soler Chrysler Plymouth Inc.

Dear Sirs,

Notice of Acceptance of
Request for Arbitration

Mitsubishi Motors Corporation as mentioned below has filed with this Association, Tokyo Headquaters, the request for arbitration dated April 23, 1982 indicating them as Claimant and Soler Chrysler Plymouth Inc. as Respondent.

We hereby notify you that this request for arbitration has been accepted on the date of this letter.

Claimant: Mitsubishi Motors Corporation
President: Teruo Tojo
33-8, Shiba 5-chome, Minato-ku
Tokyo, Japan

Respondent: Soler Chrysler Plymouth Inc.
President: Joaquin Soler, Jr.
Carretera No. 2, KM 6.8, Pueblo
Viejo Guaynabo, Puerto Rico

The following documents and Rules are attached to a copy of this letter addressed to the Respondent. The Respondent may, within forty-five (45) days from the date of this letter (by June 12, 1982), submit a written answer to this Association, Tokyo Headquarters (While the above-mentioned period shall originally be thirty (30) days under Rule 9 of the below-mentioned Rules, it has been extended for fifteen (15) days in consideration of the address of the Respondent).

Attachments to the copy of this letter addressed to the Respondent (one copy each):

(1) Request for Arbitration with English translation.

(2) A copy of the Sales Procedure Agreement with Japanese translation.

(3) The Commercial Arbitration Rules (English version).

The parties are requested to pay their attention to the following points for the proceedings under the Commercial Arbitration Rules (all of the below-mentioned periods are fifteen (15) days long than the periods stipulated respectively in the Rules, in consideration of the address of the Respondent):

(1) The parties are requested to agree, as the place of arbitration, on the Tokyo Headquarters or a branch office (Yokohama, Nagoya, Osaka or Kobe) of this Association and to give a written notice to this effect to the Tokyo Headquarters within thirty (30) days from the date of this letter (by May 28, 1982). In case the parties fail to give such notice within the above-mentioned period, this Association shall decide the place of arbitration (Rule 14).

(2) The parties may, by written agreement, appoint one or more arbitrators, or fix the number and method of selection of arbitrators (Rule 16).

However, unless this Association receives a notice of their agreement on such number within thirty (30) days from the date of this notice (by May 28, 1982), the number of arbitrators shall in principle be one (Rule 17, Paragraph 1).

If the parties fail to appoint a single arbitrator within forty-five (45) days from the date of this notice (by June 12, 1982), this Association shall appoint such single arbitrator.

As to the appointment of plural arbitrators, you are requested to refer to the provisions of Rule 17, Paragraph 2 and Rule 19.

Yours faithfully,

The Japan Commercial Arbitration Association
(sealed)

[Copy of letter in Japanese omitted in printing]

Order

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Civil No. 82-0538 (GG)

MITSUBISHI MOTORS CORPORATION,

Plaintiff and Defendant on Counterclaim,

vs.

SOLER CHRYSLER-PLYMOUTH, INC.

Defendant and Plaintiff on Counterclaim,

vs.

CHRYSLER INTENATIONAL, S.A.,

Additional Defendant on Counterclaim.

Upon consideration of defendant's motions for stay and preliminary injunction filed on May 7, and 11, 1982, the same are hereby granted.

Consequently plaintiff is enjoined from taking any further action to compel defendant Soler Chrysler-Plymouth Inc. to submit to arbitration in Japan pending a determination by this court of the issue of arbitration now before us.

/s/ GILBERTO GIERBOLINI
Gilberto Gierbolini
U.S. District Judge

Supplemental Motion for Stay Pending Arbitration

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

TO THE HONORABLE COURT:

Plaintiff and Defendant on Counterclaim Mitsubishi Motors Corporation ("MMC"), pursuant to the affidavit of Robert L. Sills, sworn to May 27, 1982, the affidavit of Mitsuaki Mitsukuri sworn to May 26, 1982, and upon MMC's motion to compel arbitration and upon all the files and proceedings heretofore had herein, respectfully moves this Honorable Court:

(a) for a Temporary Restraining Order and Preliminary Injunction restraining and enjoining Soler Chrysler-Plymouth, Inc. ("SCP") and its officers, employees or agents and all persons acting in concert with them from further prosecuting any of the counterclaims set forth in the Answer and Counterclaim of SCP herein, and staying all time periods within which MMC must reply or otherwise move with respect to SCP's counterclaims, pending this Court's determination of MMC's motion to compel arbitration;

(b) for a stay of each and every counterclaim pleaded herein by SCP and all proceedings with respect thereto, including any requirement that MMC submit responsive pleadings thereto, pending arbitration of such counterclaims;

(c) for a stay of all proceedings with respect to any counterclaim pleaded herein determined to be non-arbitrable, pending disposition of all arbitrable claims herein; and

(d) to grant MMC such other and further relief as to the Court may seem just and proper.

In San Juan Puerto Rico, on this 27th day of May 1982.

McConnell Valdes Kelley Sifre
Griggs & Ruiz-Suria
G.P.O. Box 4225
San Juan, Puerto Rico 00936
Telephone No. (809) 753-3000

By: /s/ Samuel T. Cespedes
Samuel T. Cespedes

Reboul, MacMurray, Hewitt
Maynard & Kristol
45 Rockefeller Plaza
New York, New York 10111
Telephone No. (212) 841-5700

By: /s/ Robert L. Sills
Robert L. Sills

[Certificate of Service omitted in printing]

[Affidavit of Robert L. Sills omitted in printing]

Affidavit of Mitsuaki Mitsukuri

IN THE UNITED STATES DISTRICT COURT
For The District of Puerto Rico

[Caption omitted in printing]

Mitsuaki Mitsukuri, being duly sworn, deposes and says:

1. I am General Manager of the Latin America Group of plaintiff Mitsubishi Motor Corporation ("MMC"). I am the person in charge of the sale of MMC products in Puerto Rico. I make this affidavit on personal knowledge in support of MMC's motion for an order (a) compelling Soler Chrysler-Plymouth, Inc. ("SCP") to proceed to arbitration with MMC pursuant to the terms of a written contract between them, (b) restraining SCP from commencing or prosecuting any other action concerning the matters and transactions set forth in the complaint herein, and (c) staying certain of the claims pleaded in SCP's counterclaim pending arbitration.

The Commencement of the MMC-SCP Relationship

2. Prior to 1979, vehicles sold or distributed by Chrysler Corporation ("Chrysler") through its wholly-owned subsidiary Chrysler International S.A. ("CISA") in Puerto Rico under the "Plymouth" tradename were sold through Atlantic Performance Cars, Corp. ("Atlantic"), and Chrysler-Plymouth de Ponce, Inc. ("CPP"). Similar vehicles sold under the "Dodge" tradename were distributed throughout Puerto Rico by Boricua Motors Corporation ("BMC"). Atlantic held distribution rights for Chrysler-Plymouth vehicles in the metropolitan San Juan area.

3. Certain of the Plymouth vehicles distributed by Atlantic were manufactured by MMC for Chrysler.

4. Prior to mid-1979, Atlantic's sales performance was extremely poor. At that time, the principals of SCP (the "Solers") held a franchise to distribute vehicles manufactured by General Motors Corporation ("GM") known as "Joaquin Soler Chevrolet, Inc." ("Soler Chevrolet").

5. In approximately mid-1979, the Solers organized SCP and took over Atlantic's business, facilities, inventory, distribution rights and goodwill.

Execution of the Distributor Agreement and the Sales Procedure Agreement

6. On or about October 31, 1979, SCP entered into a distributor agreement with CISA whereby it acquired a franchise to distribute Chrysler vehicles in Atlantic's former territory in Puerto Rico ("Distribution Agreement"). A copy of the Distributor Agreement was annexed to my moving affidavit, sworn to March 15, 1982, as Exhibit A.

7. At the same time that SCP and CISA executed the Distributor Agreement, MMC, CISA and SCP executed a Sales Procedure Agreement, which was intended only to facilitate the ordering by CISA distributors of MMC-manufactured Chrysler vehicles. The Sales Procedure Agreement (a copy of which was annexed to my moving affidavit as Exhibit B) explicitly provides in Article X that :

> "This Agreement does not create the relationship of principal and agent between (SCP) and MMC and under no circumstances is either party to be considered the agent of the other. Further, (SCP) and MMC hereby recognize that any direct sales made by MMC to BUYER pursuant to this Agreement shall under no circumstances be construed as forming a distributor relationship between BUYER and MMC."

MMC's Initial Advertising Campaign in Puerto Rico

8. In light of poor sales of MMC products in Puerto Rico prior to November 1979, MMC began a massive advertising campaign in various Puerto Rican media to promote its vehicles. In the period from November 1979 until October 1980, MMC expended approximately $1,000,000 for such advertising.

9. In part because of this advertising campaign, and in part because the Puerto Rican market for Japanese automobiles was very strong throughout 1980, SCP sold more vehicles during the 1980 model year than had Atlantic in prior years. However, the allegation set forth in paragraphs 67 of SCP's counterclaim that it sold 4,206 MMC vehicles during the 1980 model year is false. The truth is that SCP ordered, but did not sell, that number of vehicles. In fact, SCP sold only 3,831 vehicles during that period.

The 1981 Model Year

10. During late 1980, I and other MMC personnel spoke with CISA's Puerto Rican distributors and repeatedly warned them that their orders for MMC vehicles were too high in light of the anticipated "softening" of the automobile market. Despite those warnings, SCP placed substantial monthly orders during the period from January through July of 1981. Following these orders, which totalled 1,743 vehicles, SCP did not order any further vehicles from MMC.

11. Pursuant to agreement between MMC and SCP, vehicles must be ordered approximately 45 days in advance of production, except for vehicles to be produced in June

or July (when MMC's "model year changeover" occurs), which require 75 days' advance notice. Because of the production system employed by MMC, it is not possible to cancel those orders unless the request for cancellation is received very shortly after the order itself.

SCP's firm orders for MMC vehicles during 1981 were placed as follows:

Month	*Quantity*	*Approximate Shipping Schedule*
ORDERED AND SHIPPED:		
January	400	Feb/March
February	100	March/Apr
March	177	Apr/May
April	100	May/June
	777	
ORDERED BUT UNSHIPPED:		
May	204	June/July
June	262	July/Aug
July	500	Aug/Sept
	966	
	1,743	

Copies of the Export Sales Contracts confirming these orders are annexed hereto as Exhibit A.

SCP's Request to Cancel
Production and Shipment of Ordered Vehicles

12. On or about May 27, 1981, as the signs of the "slowdown" in the Puerto Rican automobile market became more apparent, Soler sent a telex to MMC requesting that

MMC (a) cancel its June 1981 production order of 262 units (included in the 966 units referred to in SCP's counterclaim), (b) postpone shipment of vehicles already manufactured by 30 days (including another 204 of the 966 vehicles) and (c) provide unspecified financial assistance with respect to "floor planning cost". That telex, a copy of which is annexed hereto as Exhibit B, stated in part:

> "Continued saftening (sic) of sales due to political bad news announcing cuts in food coupons and discontinuance of Federal program known as CETA Plan has caused overstock position for all Puerto Rico distributors for Japanese autos."
>
> "This continued with sudden increase in prime rate which obliges us to pay twenty two and one fourth percent interest has increased our operating cost well above permissible range."
>
> "Sales prices is low due to market glut, operating cost is up due to overstock and high interest rates."
>
> "Mr. Mitsukuri, we request MMC help us by postponing April and May production Shipments 30 days and cancellation of last month of 1981 production."

13. SCP's problems continued to worsen. On or about July 22, 1981, as this crisis in SCP's business worsened, it sent the following telex to MMC:

> "At this time we must request that you do not repeat do not book shipment for August since *we have very serious problems with our bank*. I propose shipping schedule be set back by one month for each shipment. Even though we did open L/C *please do not ship* but only as requested. In addition to this request for further delay in shipments we still wish to open 45 day L/C to reduce interest payments to the Bank." (emphasis added)

A copy of SCP's telex of July 22, 1981 is annexed hereto as Exhibit C.

14. The "serious problems" identified by SCP did not abate, and it continued to request deferral of shipment for the vehicles it had previously ordered, because of its inability or unwillingness to obtain financing and the overstock situation in which SCP found itself. Accordingl despite its strong desire to ship these vehicles and recei payment MMC complied with SCP's request and refrain from shiping these units. At no time prior to the end o November 1981 did SCP request shipment of any of the 966 units produced pursuant to its May, June and July production orders.

The Purported Refusal to Ship Vehicles to SCP

15. By telex dated November 23, 1981, SCP suddenly, for the first time since May, 1981, requested MMC to ship 204 of the vehicles held for it in Japan to Puerto Rico under a letter of credit, which SCP represented had not then expired. At that time, SCP had inventory on hand of approximately 676 vehicles, and another 966 vehicles—including the 204 which were the subject of that telex—manufactured pursuant to its orders being held in Japan by MMC. A copy of that telex is annexed hereto as Exhibit D.

16. In fact, the letter of credit referred to in SCP's telex had already expired, because it specified a final shipment date of November 16, 1981. (A copy of that letter of credit is annexed hereto as Exhibit E.) Accordingly, SCP's bank would not have paid MMC under that letter of credit, despite SCP's contrary representations.

17. MMC responded to SCP by telex dated November 27, 1981, a copy of which is annexed hereto as Exhibit F. In relevant part, that telex stated:

> "Although in your telex, you requested us to ship 204 units of '81 models by the time the existing L/C expires, we understand that because you have been in overstock situation, you have been appreciating our postponement of the captioned shipment and our not utilizing the existing L/C.
>
> "However, *if you are now in a position to take the units immediately, we would of course be happy to arrange a vessel to bring you the units.* As you know quite well, the arrangement of a vessel would require a certain lead time and it would be probably impossible to contract with the shipping line for the vessel to realize the captioned shipment by December 1 when your L/C expires. Therefore, *we would request you to amend the L/C to extend the expiration date and the last shipment date until December 31, 1981, by which time we could arrange a vessel* and realize the captioned shipment.
>
> "We have to add, however, that as you also know, the shipment of less than 500 units (per vessel/per destination) could not allow you to enjoy the specially favoured volume freight rate, and therefore, you would have to pay nearly 60 percent (see note) more for the captioned shipment if the other distributors in Puerto Rico should not agree to the shipment of more than 296 units on the same vessel.
>
> "Therefore, if you should wish to get 204 units shipped definitely in December, *we would further request you to amend the L/C to increase its value amount to Dlrs. 1,026,730.00* (1,026,730.00)."

18. The 60% surcharge charged by the shipping company for shipment of fewer than 500 vehicles ranged from

$247 to $354 per vehicle. I understand that, at the time of this request, SCP's average gross margin per vehicle was approximately $350.

19. Following this November 27 telex SCP never indicated its desire to have the requested 204 vehicles shipped at unfavorable rates, nor did it procure the necessary amendments to its letter of credit. In fact, it never meaningfully responded to MMC's telex of November 27 at all.

20. Thereafter, SCP was unable to procure any further letters of credit, as required by Article I of the Sales Procedure Agreement. Rather, it continued to sell vehicles from its substantial inventory.

21. On February 12, 1982, SCP (together with BMC and CPP) sent a telex to MMC (a copy of which is annexed hereto as Exhibit G) which further confirms the falsity of its allegations that MMC refused to ship cars desired by SCP. In pertinent part, that telex stated:

> "We would like to again point out that early in April, 1981, Boricua Motors asked you to cancel, or, if impossible to do so, convert those units (including 466 vehicles manufactured for SCP) to 1982 models. Later on all three distributors again asked you to cancel production of those units. We consider that your refusal to act on our instructions was unreasonable, therefore, we do not feel responsible for these vehicles."

It is striking that, as recently as February 12, 1982, SCP was insisting (a) that MMC should have cancelled production of the vehicles held for it in Japan and (b) sought to avoid financial responsibility for those vehicles. It is readily apparent that SCP's current claims that MMC "withheld" vehicles are only the contrived basis for their antitrust claims.

22. On or about February 23, 1982, SCP voluntarily surrendered to its bank 412 MMC vehicles already in its inventory which it could not sell in partial satisfaction of its debt. Based on its January and February 1982 sales, those units represented approximately a four month supply of vehicles.

23. I submit that the foregoing demonstrates that the alleged "refusal" to ship ordered vehicles which lies at the heart of SCP's defense to MMC's complaint and motion to compel arbitration and its counterclaims is a complete distortion of the facts. SCP exercised poor business judgment, and ordered far more vehicles than its Puerto Rican market could absorb. Because SCP overordered and then failed to request cancellation of those units in a timely fashion, and thereby rendered impossible cancellation of the vehicles manufactured to fill its "firm" orders, MMC stored them in Japan at SCP's request, and did not demand either payment or the distress unit penalties to which it was entitled. When SCP finally requested shipment of some of these vehicles, it did so on impossibly short notice and based upon a letter of credit which had already expired and which was issued in an inadequate amount. I submit that the claim that MMC withheld shipment of vehicles is patently false.

SCP's Attempt to Transship Vehicles

24. The claim that MMC frustrated transshipment of vehicles by SCP without justification is also demonstrably false.

25. In or about August, 1981, MMC inadvertently learned that SCP was attempting to dispose of all or a portion of its long unsold inventory elsewhere in Latin America. By hand-delivered letter dated September 4,

MMC advised SCP that it would not consent to such transshipment for the following reasons:

(a) All of SCP's stock of vehicles was designed to run on high-octane unleaded fuel. Other than in Puerto Rico, only leaded fuel (and a small amount of low-octane unleaded gasoline) is available. Attempting to run these vehicles on such fuel would cause serious damage.

(b) MMC was concerned that the vehicles would be shipped in an improper manner, resulting in damage.

(c) Certain of the vehicles would require additional equipment in order to meet local motor vehicle laws or climatic conditions. MMC was concerned that non-standard equipment might be used or might be installed in an unworkmanlike manner.

(d) MMC was not assured that after sales service would be available for vehicles bearing its trademark.

A copy of MMC's letter of September 4, 1981 is annexed hereto as Exhibit H.

26. On or about January 25, 1982, BMC, on behalf of itself and the two other CISA distributors, stated that it had requested permission from MMC to transship cars (either from Puerto Rico or Japan) to the United States (See Exhibit I). Although SCP never explicitly sought permission for such a transaction from MMC, MMC had declined to consent to the transshipment proposed by BMC. Its stated reasons for withholding such consent were:

(a) FMVSS 103, 44 C.F.R. § 571.103 requires that vehicles sold on the mainland be equipped with heaters and defoggers, whereas Puerto Rican vehicles are ordinarily not so equipped. The inventory, manufactured to the requirements of the three CISA distributors lacked heating and de-fogging equipment. MMC was concerned with possible problems arising from the use of non-standard equipment or substandard installation.

(b) The vehicles carried MMC trademarks, whereas no such vehicles were sold on the mainland.

(c) MMC understood that the vehicles would be sold in a "distress" and "as-is" manner thereby damaging MMC's good name and reputation.

(d) MMC had received no assurance that the vehicles would be properly packed, shipped or inspected upon arrival.

(e) Chrysler had informed MMC that its dealers were not obligated to service these vehicles, and would probably not do so. Accordingly, it appeared that there could be no assurance of proper after-sales service, with consequent injury to MMC's good name and reputation.

(f) The government of Japan has imposed separate quotas for the export of Japanese manufactured vehicles to the mainland United States and to Puerto Rico. It appeared possible that the proposed transshipment would have an adverse effect on MMC's rights under that program.

A copy of one of MMC's responsive letters is annexed hereto as Exhibit J.

27. By reason of the foregoing, it is clear that MMC had ample business justification for its refusal to consent to transshipment. Far from being part of an illegal conspiracy, it was a prudent unilateral decision intended to protect MMC's trademarks and associated goodwill.

MMC's Efforts to Assist the Puerto Rican CISA Distributors

28. The alleged "conspiracy" to destroy SCP's business is also a complete distortion. The record shows that MMC has consistently attempted to support its failing Puerto Rican distributors.

29. In or about September 1981, MMC proposed a "salesmen's incentive program" for the CISA distributors. A copy of MMC's written proposal is annexed hereto as Exhibit K.

30. By letter dated September 22, 1981, the three CISA distributors in Puerto Rico jointly wrote to MMC respecting the company's offer to provide a salesman's incentive plan. That letter, a copy of which is annexed hereto as Exhibit L, requested MMC to fund a cash rebate plan instead.

31. On September 25, 1981, the three CISA distributors again wrote to MMC on this subject. In relevant part, that letter stated:

> *"The total combined MMC—Distributors budget for this program is $385,000.00* on a 50-50 basis.
>
> "At the sales rate as projected in the attachment this budget would be utilized completely early in December, at which time each distributor would have to fund his own program to dispose of the '81 models.
>
> *"Since none of us can open L/C's now,* this creates a shortage of NE44, YD23 and SP27 for Boricua. To supplement our inventory we will be buying a quantity of these models from Soler and/or Ponce. This does not reflect in the attachment." (Emphasis added)

A copy of the September 25, 1981, letter signed by SCP is annexed hereto as Exhibit M.

32. MMC responded affirmatively to the CISA distributors' request. By letter dated October 2, 1981, it stated:

> "This is to confirm our acceptance of your proposal of Cash rebate Program (for '81 model NE24) in your letter dated September 25, 1981 which was addressed to Mr. Y. Goto. The program was discussed and already agreed to between you on behalf of all three distributors and I during my stay in Puerto Rico.
>
> * * *
>
> *"We are expecting your successful sales on this program and would like to review its effectiveness one month later to extend the program for another months."* (Emphasis added)

A copy of MMC's letter of October 2, 1981 is annexed as Exhibit N.

33. MMC did in fact extend the rebate program. By telex dated November 4, 1981, it confirmed that it would continue to fund the rebate program during the month of November. A copy of that telex is annexed hereto as Exhibit O.

34. The documents quoted above demonstrate that, at the time of the alleged "conspiracy" to destroy SCP's business MMC voluntarily advanced a substantial sum of money to fund a rebate program, which was not required by any contract, to revive the business of all three CISA distributors. In fact, during October 1981, SCP's sales increased 70% over its September sales, and its November sales were 193% greater than those in September. MMC's willingness to fund this program is a graphic demonstration that its efforts were aimed at extricating the three CISA distributors from the difficulties in which their own business judgment had placed them, at substantial cost to MMC,

since the vehicles being sold by the three CISA distributors under the rebate program had been paid for and shipped to the CISA distributors months earlier.

35. MMC made other efforts to assist SCP. For example, in August, 1981, MMC began an advertising campaign in Puerto Rico, utilizing the services of the Badillo-Compton Agency. Pursuant to the terms of the agreement for that advertising campaign, MMC expended more than $300,000 toward local advertising for the three CISA distributors.

36. By letter dated February 1, 1982, MMC wrote to Chrysler seeking its aid in assisting the three CISA distributors. That letter, a copy of which is annexed hereto as Exhibit P, provided that:

> "As set forth in the attachment, MMC is prepared to incur costs of approximately $3 million in order to revitalize the distributors' sales momentum and help the distributors out of their present difficulties."

Furthermore, as the February 1 letter makes clear, the goal of the assistance plan proposed by MMC was to enable the three CISA distributors to import the 2,847 vehicles held for them by MMC in Japan by (a) granting additional discounts to the distributors of $1,000,000; (b) releasing the distributors from their obligations to pay $1,200,000 in accrued distress unit penalties; and (c) directly expending $500,000 for television and print advertising.

MMC's Proposal to the Three CISA Distributors

37. It is true that one of the many proposals made by MMC in the course of its efforts to salvage the sales of the

Puerto Rican CISA distributors included a plan to set up a single importing and distribution company, which would in turn sell vehicles to the three existing CISA distributors. (A copy of MMC's proposal is attached to SCP's papers.) It is also true that MMC offered to waive payment of the very substantial sums otherwise owed to it in order to induce the distributors to enter into the proposed arrangement, and in addition offered to ship the 2,162 units of 1981 model vehicles then held in Japan at a further discount of $480 per vehicle.

38. MMC's proposal was not one that it sought unilaterally to impose. It was merely offered to the distributors as one proposal for restoring MMC's sales volume in Puerto Rico, which had been squandered by the three CISA distributors. There was no threat or coercion in the plan, and no CISA distributor was ever informed, directly or indirectly, that its franchise would be terminated if it did not accede to MMC's proposal. In any event the plan has never been carried into effect.

39. During a meeting held in San Juan on February 22, 1982, at which MMC and SCP were discussing means to improve MMC sales performance and further financial assistance to SCP, attended by the Solers, Mr. Ueda, myself, Mr. Imajo, Mr. Goto, Mr. Matsuda, Mr. Joaquin Soler, Jr. stated that SCP no longer wished to continue selling MMC vehicles and that SCP refused to conduct any further business with MMC.

40. Subsequent to that February 22, 1982 meeting MMC has been and is now engaged in yet other efforts to assist the business of the two remaining CISA distributors, in which SCP would have participated had it not voluntarily severed its relationship with MMC. In fact, on March 31, 1982, MMC guaranteed a loan of

$1,806,169 from Bank of America which enabled Chrysler Plymouth de Ponce, Inc. ("CPP"), to purchase 395 of 412 vehicles previously surrendered to its bank by SCP. Without MMC's guaranty, that financing would not have been available. In the period since then, MMC has guaranteed (in the form of "repurchase agreements") an additional $5,268,389 in loans to CPP and Boricua Motors Corp. ("BMC") to enable BMC and CPP to purchase vehicles previously held in Japan.

Conclusion

41. The foregoing amply demonstrates that the claims of SCP rest upon a fabricated version of the facts. Those claims, for which it purports to seeks millions of dollars in damages, are completely without color, and have apparently been interposed solely for purposes of delay. I respectfully submit that they are nothing more than an attempt to create a smoke-screen, and provide no basis upon which to deny or delay the arbitration with MMC to which SCP agreed.

42. I respectfully request that this Court grant in their entirety MMC's motions (a) to compel arbitration of the claims pleaded in its complaint (b) to restrain SCP from instituting or prosecuting any other action against MMC, and (c) to stay pending the arbitration claims for relief pleaded in SCP's counterclaim.

/s/ [Illegible]
Mitsuaki Mitsukuri

[Subscribed and sworn
to May 26, 1982]

[Jurat omitted in printing]

Exhibit G to Mitsukuri Affidavit

February 12, 1982

Attention: M. Mitsukuri
M. Ueda

Info: Y. Goto/MMC San Juan
WF/JS/FS/04

Dear Mr. Mitsukuri:

This has reference to your telex M-06 concerning the installation of heaters on 1981 model Colts and Champs in Japan.

We would like to again point out that early in April, 1981 Boricua Motors asked you to cancel, or, if impossible to do so, convert those units to 1982 models. Later on all three distributors again asked you to cancel production of those units. We consider that your refusal to act on our instructions was unreasonable, therefore, we do not feel responsible for these vehicles.

In our letter of August 18 to Mr. Goto replying to his letter of August 12, we gave you information that proved your reasons for prohibiting us from selling cars to the mainland had no basis whatsoever. Your position was, and is, a serious restraint of trade on your part and is against U.S. and Puerto Rico laws.

In our letter of January 25, 1982 we gave you reliable information on shipment to the U.S. of other Japanese makes. You had requested this information in our recent meeting. We know that Mr. Goto has also obtained this information from two steamship companies. These shipments are continuing. If other Japanese manufacturers allow and even encourage this activity, why then do you

put such a restraint in your written proposal of assistance which was presented to the banks and us, it states "add specified options to these vehicles without cost to the distributors". The banks and ourselves are amazed that you are now reneging on this offer, since you refuse to install heaters.

We have evidence that Chrysler is giving warranty service to cars we have sold here to customers who have taken them to the states.

Why should these cars be included in the system and others not be? We are sure you realize there is a law regarding this that must be complied with.

Chrysler cannot legally prohibit their dealers in the U.S. from selling cars in Puerto Rico and likewise they cannot prohibit us from selling cars in the U.S. This is called restraint of trade and we are sure Chrysler is well aware and will comply with the laws.

In the dinner at Don Pepe's you said that if a dealer of one of the three distributors ship cars to the states, Mitsubishi could not do anything. Why would this be any different if one of the distributors was the shipper? Once again, your policies discriminate against the distributors.

We want Mitsubishi to reconsider this matter with all the true facts given here and to realize that your position is very unjust, unreasonable and illegal.

This telex is made on behalf of the three Puerto Rico Mitsubishi distributors.

Regards

Affidavit of Joaquin Soler

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

COMMONWEALTH OF PUERTO RICO }
CITY OF SAN JUAN } ss.:

JOAQUIN SOLER, being duly sworn, deposes and says:

1. I am President of Soler Chrysler-Plymouth, Inc. ("Soler"), the defendant and plaintiff on counterclaim herein, and I have direct personal knowledge of the facts and circumstances set forth herein. I make this affidavit in opposition to Mitsubishi Motor Corporation's ("Mitsubishi") motion and supplemental motion for an order compelling Soler to proceed to arbitration with Mitsubishi, and staying certain of the claims pleaded in Soler's counterclaim pending arbitration, and related relief.

2. The claims that Mitsubishi seeks to arbitrate arise directly from practices and policies adopted by Mitsubishi, individually, and in conjunction with Chrysler International, S.A. ("Chrysler") prior to and continuing throughout the period of Soler's relationship with Mitsubishi.

3. The business relationship between Soler and Mitsubishi was established pursuant to the execution of a Sales Procedure Agreement dated October 31, 1979 to which Chrysler was a party. (A copy of the Sales Procedure Agreement is annexed as Exhibit "B" to the affidavit of Mitsuaki Mitsukuri sworn to March 15, 1982). Soler and Chrysler also executed a Distributor Agreement dated the same date. (A copy of the Distributor Agreement is annexed as Exhibit "A" to the affidavit of Mitsuaki Mitsukuri sworn to March 15, 1982.)

4. Under the terms of said agreements Soler was granted the right to purchase automotive products manufactured by Chrysler and Mitsubishi for resale.

5. Pursuant to the agreement entered into between the parties, Soler was obligated to sell a minimum number of Mitsubishi vehicles during any one model year (a minimum sales volume). Deponent believed that the failure to achieve such a minimum level of sales would purportedly provide a basis for Mitsubishi to seek to terminate its agreement with Soler.

6. Soler was expected to sell 1,992 Mitsubishi vehicles during the 1980 model year to fulfill the then requirements of the minimum sales volume. (See copy of letter dated October 31, 1979 annexed hereto as Exhibit "A").

7. In order to promote and develop its franchise Soler expended considerable time and large sums of money and by virtue of its efforts Soler successfully met and exceeded its minimum sales volume for the 1980 model year. Soler's efforts established a large and profitable distributorship and dealership. In so doing Soler enhanced the goodwill, market penetration and reputation of the Chrysler and Mitsubishi products, as acknowledged by Mitsubishi in its telex of September 3, 1980, a copy of which is annexed hereto as Exhibit "B".

8. Thereafter, Soler received notice from Mitsubishi informing Soler that for the model year 1981, commencing November 1, 1980, Soler was obligated to achieve a minimum sales volume of 4,500 Mitsubishi vehicles. (A copy of this notice is annexed hereto as Exhibit "C"). This represented an increase of some 226% over the minimum sales volume Soler was obligated to achieve during the previous model year.

9. Upon information and belief, based upon a reading of the affidavit of Mitsuaki Mitsukuri sworn to May 26, 1982, this enormous increase in the minimum sales volume Mitsubishi demanded Soler fulfill, came at a time when Mitsubishi itself anticipated a softening of the market for Mitsubishi vehicles in the island of Puerto Rico. Therefore, at the same time that Mitsubishi anticipated Soler might have difficulty in meeting even the lower quota of the prior year Mitsubishi demanded Soler meet more than double that requirement.

10. In order to meet its obligations to achieve its minimum sales volume, and avoid the loss of its franchise, Soler ordered vehicles in sufficient quantity so as to meet its responsibilities thereunder.

11. Among other things, in order to fulfill the demands placed upon it by Mitsubishi, Soler, individually, and in conjunction with two other Puerto Rico dealers, actively pursued the possibility of selling these vehicles to buyers in the mainland United States and Latin America.

12. However each and every attempt to arrange for the possible transshipment of these vehicles was repeatedly opposed by Mitsubishi and thereafter by Chrysler. (See, for example, telex from Mitsubishi dated July 8, 1981 annexed hereto as Exhibit "D"; telex from Chrysler dated July 31, 1981 annexed hereto as Exhibit "E"; letter from Mitsubishi dated September 4, 1981 annexed hereto as Exhibit "F"; telexes from Mitsubishi dated February 9, 1982 and February 19, 1982 annexed hereto as Exhibits "G" and "H" respectively).

13. Despite the inventive variety of purported justifications advanced by Mitsubishi and Chrysler, they were aware that other Japanese automobile manufacturers allowed for the transshipment of vehicles to the mainland United States.

(See copy of telex dated February 12, 1982 annexed as Exhibit "G" to the affidavit of Mitsuaki Mitsukuri sworn to on May 26, 1982). If Mitsubishi had acted in good faith, Soler could have alleviated the purported problems involved in any such transshipment.

14. It soon became apparent that the primary reason for the refusal to allow for transshipment was grounded in arrangements entered into between Chrysler and Mitsubishi which served to prohibit same. Included in these arrangements was a trademark and warranty program through which deponent learned they had allocated territories between them. (See copy of telex from Chrysler dated July 31, 1981 annexed hereto as Exhibit "E").

15. One of the purported justifications strenuously maintained by Mitsubishi was that it was illegal to sell vehicles which were not equipped with heaters and defoggers to the mainland United States. Soler sought to overcome Mitsubishi's objection in this regard and offered two possible solutions to this problem: (1) that Mitsubishi provide Soler with vehicles that were so equipped which, if necessary, Soler would pay for, or (2) that pursuant to the Sales Procedure Agreement Soler purchase these parts and install them itself. Both proposals were flatly rejected. (See copy of telex dated January 25, 1982 sent to Mitsubishi annexed hereto as Exhibit "I").

16. The basis for Mitsubishi's rejection of the second proposal was that they could not be sure the parts would be installed in a workmanlike manner. Yet, pursuant to the Sales Procedure Agreement Soler provided warranty service on each and every vehicle sold for Mitsubishi as well as for Chrysler. The warranty service provided by Soler included work much more difficult than what appeared to be the simple installation of heaters and defoggers and Soler

had received no complaints from Mitsubishi or Chrysler concerning the performance of these services in the past.

17. On previous occasions Mitsubishi had offered to install additional options on vehicles without charge. Nevertheless, with regard to the installation of heaters and defoggers, which Soler had offered to pay for, Mitsubishi refused to do so. The reason for this refusal could only have been Mitsubishi's express desire to confine sales by Soler to its area of primary responsibility and prevent Soler from competing in the mainland market. See telex dated February 19, 1982 from Mitsubishi annexed hereto as Exhibit "H", in which Mitsubishi stated:

> "Our previous offer to install additional options without charge was intended to assist you in improving Puerto Rican sales not to facilitate sales on the mainland."

18. Likewise, Mitsubishi's claim that they received no assurance that the vehicles would be properly packed, shipped or inspected upon arrival is similarly unjustifiable. Had Mitsubishi not consistently objected to transshipment there is no reason why suitable arrangements in this regard could not have been made.

19. It is thus plain that the refusal to allow for transshipment was grounded in the arrangements between Chrysler and Mitsubishi and their desire that Soler not be permitted to compete in those other markets.

20. Meanwhile, at the same time that Mitsubishi was taking advantage of the saturated Puerto Rican market, it exacerbated the financial strain on Soler by preventing transshipment and also delayed making warranty reimbursements due and owing Soler. Mitsubishi's actions appeared designed to prevent Soler from fulfilling its ob-

ligations under the Sales Procedure Agreement, and to financially cripple Soler, but Mitsubishi's ultimate purpose was not yet clear. (See telex dated February 26, 1982 annexed hereto as Exhibit "J". Also see telex dated April 21, 1982 annexed hereto as Exhibit "K").

21. In an effort to alleviate these problems, Soler entered into negotiations with World Car International ("W.C.I.") for the possible sale of its franchise. However, upon information and belief, Mitsubishi unilaterally interfered with these negotiations and as a direct result thereof Soler was advised by Mitsubishi (which Soler had not invited to participate in the negotiations) in January, 1982 that W.C.I. was no longer interested in this transaction.

22. In February of 1982, Mitsubishi's ultimate desire finally became apparent. Soler and the other Mitsubishi dealers in Puerto Rico received a proposal from Mitsubishi under which Mitsubishi would install its own wholly-owned subsidiary as exclusive distributor of Mitsubishi vehicles in Puerto Rico. (See copy of the proposal annexed hereto as Exhibit "L"). If Soler accepted the proposal Mitsubishi advised Soler that it would dispose of the disputed 966 vehicles on its own. If Soler refused to accept the proposal, Mitsubishi would seek to hold Soler responsible for the vehicles. Soler rejected this proposal under which Mitsubishi would have capitalized on the goodwill and efforts of Soler, to usurp the market Soler had carefully cultivated, and shortly thereafter Mitsubishi instituted the within action.

23. At no time prior to the commencement of this action did Mitsubishi advise Soler that its franchise had been terminated, or that Mitsubishi believed the agreements terminated by their own weight if not expressly renewed.

24. It is respectfully submitted that the actions on the part of Mitsubishi heretofore described were undertaken in bad faith in an attempt to unlawfully restrain trade and misappropriate the substantial goodwill, market position and reputation of Soler Chrysler-Plymouth. Mitsubishi should not be permitted to compel Soler to arbitrate its disputes in Japan or be denied access to this court and the safeguards inherent in this forum.

25. I am advised by counsel, and believe, that this forum provides means and procedures by which Soler can seek to remedy the detriment caused to its established relationship. I further believe that the expedited proceedings in an arbitration will not permit a proper exploration of the facts and will not satisfy Soler's desire to lay bare the truth of Mitsubishi's actions in its dealings in Puerto Rico.

WHEREFORE, it is respectfully requested that the motion and supplemental motion by Mitsubishi to compel arbitration and for a stay be denied, and alternatively that any claim found to be arbitrable be stayed by the Court pending resolution of the counterclaims asserted by Soler.

San Juan Puerto Rico, this 29th day of June, 1982.

/s/ JOAQUIN SOLER
Joaquin Soler

[Subscribed and sworn
to June 29, 1982]

[Jurat omitted in printing]

Exhibit A to Soler Affidavit

Soler Chrysler Plymouth, Inc.
Carretera No. 2, KM 6.8
Pueblo Viejo Guaynabo
Puerto Rico

Dear Sirs,

We refer to the Distributor Agreement (the "Distributor Agreement") dated as of 31st October 1979 between you and Chrysler International S.A. ("CISA") and the Sales Procedure Agreement dated as of 31st October, 1979 among you, CISA and Mitsubishi Motors Corporation ("MMC"). You have agreed to the minimum sales volume set forth below for the period there specified:

	Per Month	*Per Annum*
NE-24	107 units	1,284 units
ANC	26 units	312 units
YC-29	2 units	24 units
YC-45	4 units	48 units
SP-27	27 units	324 units
TOTAL	166 units	1,922 units

PERIOD: From November 1, 1979 through October 31, 1980.

You agree that achievement of the minimum sales volume set forth above is an essential obligation of yours under the Distributor Agreement and that failure to achieve such minimum would adversely and substantially affect the interest of CISA and MMC in promoting the marketing and distribution of Motor Vehicles (as defined in the Distribution Agreement) in Puerto Rico.

You further agree that achievement of the minimum sales volume set forth above will be necessary for you to achieve a satisfactory level of sales and profits for you to wish to continue as a distributor of Motor Vehicles.

Very truly yours,

CHRYSLER INTERNATIONAL S.A.
By /s/ [Illegible]

MITSUBISHI MOTORS CORPORATION
By /s/ [Illegible]

The above hereby agreed to:

Soler Chrysler Plymouth Inc.
Carretera No. 2, KM 6.8
Pueblo Viejo Guaynabo
Puerto Rico

By /s/ [Illegible]

Exhibit D to Soler Affidavit

[Retyped copy of telex]

JUL 08 AST0401
TO: Boricua Motors Puerto Rico
FM: Mitsubishi Motors Corp. Tokyo
ATTN: Mr. I.W. McIlvain
INFO: Mr. Y. Imajo/Mr. Y. Goto

Thank you very much for your report on the sales in June. Although the actual figure just fell short of your forecasted one which we had been informed of by Mr. Goto, we would appreciate your efforts to have achieved 99 PCNT results.

We assume that competition will become much severer after this August, but if you could make jettisoning sales in July and August, your position will be greatly improved afterwards. In this sense, we would sincerely wish you to keep such level of sales as you forecasted.

In the meantime, we are very sorry that we could not accept your request in the last paragraph of your IWM-121. As I told you at the previous meeting, the diversion of the units in Puerto Rico to the U.S. mainland would trigger a drastic Japanese government control on volume of exports for the market of Puerto Rico.

Because this is not a simple matter of MMC-Chrysler business arrangement, but an issue with a tint of political complication, we do hope for your understanding.

Best Regards
M. Mitsukuri

Exhibit E to Soler Affidavit

[Retyped copy of telex]

July 31, 1981

Detroit, Michigan
To: Joaquin Soler
Chevrolet, Inc.
Ave. John F. Kennedy KM 4, HM 2
Puerto Nuevo, P.R.
Soler Chrysler Plymouth Inc.
Josol San Juan

(Message also sent to Boricua Motors Corp., Bomoco San Juan, Puerto Rico; Chrysler Plymouth De Ponce Inc., San Juan, Puerto Rico Tx: RCA 325 3534 Careli Pt Info: M. Omara/C.A. Preyserl CISPR Hato Rey, Puerto Rico; R.A. Perkins CSHPD Highland Park, Michigan; W.H. Shepherd Tokyo, Japan TLX: 78122128 CISSAJBO W.L. Hughes Handled)

We have been requested by Mitsubishi management to clarify Chrysler's position concerning your joint request to consider the possibility of diverting shipment of your unsold 1981 model Mitsubishi passenger car for resale thru U.S. dealers in the U.S. domestic market. There are several very import [sic] reasons why Chrysler cannot agree to this diversion proposal and Mitsubishi management is in full concurrence with the Chrysler position.

1) The shipment of Japanese cars into the U.S. market is being very closely monitored today by M.I.T.I. Because of the voluntary quotas established by the Japanese government for the shipment of Japanese cars into the market, M.I.T.I. has advised the Japanese manufacturers that they will not be permitted to ship units first to Puerto Rico

and then divert them to the U.S. market to circumvent the Japanese quotas.

2) Chrysler's take of Mitsubishi vehicles for the U.S. market is negotiated directly between the two companies and allocations and subsequent dealer orders are based upon this negotiated volume. There can be no deviation from this agreement and U.S. Dealers would not be permitted by Chrysler Corporation to accept cars diverted from Puerto Rico for resale thru their dealerships.

Chrysler, of course is very sympathetic to your current condition of having an overstock of Mitsubishi cars. We have already and will continue to put pressure on Mitsubishi to find a way to relieve some of the pressure on your overstock situation and the over utilization of your credit lines.

We believe it is absolutely necessary and are urging Mitsubishi to consider new measures to relieve your 1981 model inventory problem. We will continue to do everything possible to assist you with this problem, but we simply cannot approve the proposal to divert your excess units to the U.S. market.

Regards,

J. J. Hummon
General Manager

Exhibit G to Soler Affidavit

February 9, 1982

Mr. Walter Fernandez, Sr.
Chairman of the Board
Boricua Motors Corporation
G.P.O. Box 368
San Juan, Puerto Rico 00936

Dear Mr. Fernandez:

Request for Installation of Heaters

We are responding to your letter of January 25, 1982 concerning the installation of heaters in the 1981 model year NE-24 and NE-44 vehicles you previously ordered which are now in stock in Japan.

I.

Your letter does not state any reason why heaters should be installed in these vehicles. Furthermore, such equipment is not required by law for vehicles sold in Puerto Rico, and we have never shipped heater-equipped vehicles to you in the past. However, judging from the context of your letter (in particular its reference to the purported transshipment of other Japanese-manufactured vehicles to the mainland United States) and our discussions in January 1982, we can only conclude that you made your request in connection with a possible sale of these vehicles to a mainland purchaser.

II.

In our letters to you of August 12, 1981 and August 31, 1981, we set forth our reasons for refusing to consent to any transshipment of MMC vehicles to the mainland

United States. While the factory installation of heaters might alleviate one of those problems, the balance of our concerns remain valid today. Accordingly, MMC will not consent to any such transshipment, and will not install heaters or authorize their installation in order to facilitate such shipment.

During our discussions in January, 1982, you stated that your prospective purchaser was an unidentified Chrysler dealer. Even if properly equipped vehicles were shipped to a mainland Chrysler dealer, the problems described in our previous letters would not thereby be alleviated. Moreover, in light of the number of vehicles involved in this proposed transaction, it appears that most (if not all) of the vehicles would be resold to other distributors. We have no assurance that such subdistributors would be Chrysler dealers, or, indeed, that they would be dealers in new automobiles at all. Furthermore, we understand that even transshipped vehicles sold to the public by your prospective customer or any other Chrysler dealer would not be included within the Chrysler warranty system.

III.

Any present sale or distribution by you of MMC vehicles in the mainland United States would also require the consent of Chrysler Corporation and its wholly-owned subsidiary, Chrysler International S.A. (collectively "Chrysler"), pursuant to their respective rights under certain agreements with us and with you. We have no reason to believe that Chrysler would waive its rights and permit you to make such sales. Furthermore, it is possible that a transshipment of MMC vehicles such as you have previously proposed could expose MMC to liability to Chrysler or other parties under applicable law.

IV.

Accordingly, we will not consent to any transshipment of vehicles to the mainland United States, and we will neither install nor permit the installation of any equipment which would facilitate transshipment of vehicles sold to you for distribution in Puerto Rico. If you do attempt to make such a shipment, we will take such action as we deem appropriate to protect our rights.

Very truly yours,

MITSUBISHI MOTORS CORPORATION

/s/ [Illegible]
M. Mitsukuri
General Manager
Latin America Group
Office of International Business

Exhibit I to Soler Affidavit

January 25, 1982

Mr. M. Ueda
Director & Vice General Manager
Office of International Business
Mitsubishi Motors Corporation
P.O. Box 17
Takanawa, Tokyo
JAPAN

Dear Mr. Ueda:

According to your request and our petition, made in the meeting held on January 22 in Boricua's office, we write this letter. We need for you to install heaters in all the units for 1981 models, NE-24/44 that you have in stock.

If you are not able to install these heaters then we can accept that you will place the heaters in the trunk of each one of these units that do not have air conditioners.

We believe that this should be at no additional cost, since this is a small item and will help to solve a big problem that we both have. The cost of the heater for the Datsun is $24.00 per unit, installed, and they have shipped over 1,000 units to the States. For the Honda, the heater is included in the price. They have shipped over 2,000 units. The cost of the heater for the Toyota is $18.00, installed and they are planning to start shipping next month, because they just received the units. This information was obtained by speaking with each one of the principals in each Company. If there is a cost, please let us know how much will be deducted from the total discount of $1,500,000.00 that you have offered on these units.

As we told you in the meeting, this information is most urgently needed, so please answer within the next few days.

Very truly yours,

/s/ WALTER FERNANDEZ
Walter Fernández
Chairman of the Board

WF: mm
cc: M. Mitsukuri
V. Goto

Exhibit J to Soler Affidavit

[Retyped copy of telex]

February 26, 1982

Att: Mr. Montomori Nawata
Warranty Department

We have in excess of 253,000.00 81N warranty payments over due us which we have requested innumerable times.

At this time we are surprised that you have not given it the necessary consideration.

We must have our money which has been advanced on your behalf for labor and parts as we cannot continue waiting indefinitely for you to fulfill your financial obligations.

Very truly yours:

Jose Silva
Comptroller
Soler Chrysler Plymouth Inc.

Exhibit K to Soler Affidavit

ATT: Mr. Montomori Nawata
Warranty Department

We have hundreds of thousands of dollars in warranties pending of payment and you take your good time in reimbursing us. We pay cash for parts and labor and cannot wait forever to collect.

Please send payment as soon as possible.

Andy Soler

Soler Chrysler Plymouth Inc.

ATT: Mr. Mitsukuri

We have 8000.00 U.S. dollars pending of payment by you on bonus program which we advance to customers. Please remit so we can meet our obligations as they are over 60 days old.

Andy Soler
Soler Chrysler Plymouth Inc.

Exhibit L to Soler Affidavit

Establishment of MMC Importer-Distributor Company for Puerto Rico

Mitsubishi Motors Corporation ("MMC") remains willing to try to develop a constructive approach for assisting you in overcoming your present difficulties. MMC believes that its approach can help you address the following two problems now facing you. First, you must find a way to obtain financing in order to resume ordering MMC vehicles so that you will be able to continue making sales. Second, you must find a way to sell in Puerto Rico the 1981 and 1982 model year vehicle stock which you previously ordered but which still remains in Japan.

In addition to addressing these problems, MMC thinks that the parties should formulate an arrangement for MMC vehicle sales in Puerto Rico after CISA's distribution rights for MMC vehicles in Puerto Rico expire in August 1982 and after MMC at that time introduces 1983 model year Mitsubishi-badged vehicles which will not carry the CISA-designated names and badges.

MMC believes that it has developed a very positive approach for addressing the above two problems and for formulating the arrangement referred to above. Summarized below are the proposals which, together as one "package", comprise the approach that MMC thinks will enable you to obtain the financing for the resumption of orders in the Spring, will relieve you in substantial measure from your present continuing responsibility to purchase the present Japan stock of 1981 and 1982 model year vehicles and will also permit a smooth transition to a new arrangement following CISA's return to MMC of distribution rights for MMC vehicles in Puerto Rico.

MMC is certain that you will recognize that these proposals, when taken together, provide a fair and equitable approach for dealing with the issues confronting all parties. MMC, therefore, wishes to emphasize that these proposals are offered as a "package" whereby each party will contribute in some way to resolving the problems and issues in Puerto Rico.

MMC proposes to establish a company under its control which will import and distribute MMC vehicles in Puerto Rico. This importer-distributor company would order vehicles from MMC and, at its own risk, purchase these vehicles from MMC, transport them to Puerto Rico and stock them in its own inventory in Puerto Rico for eventual resale to Puerto Rican dealers. Under this proposal, therefore, the MMC importer-distributor company would be responsible for paying the FOB purchase price of vehicles ordered from MMC and for paying whatever interest costs and other carrying charges are associated with transporting these vehicles to Puerto Rico and stocking them until they are sold to dealers.

Most importantly, if MMC implemented this proposal you could shorten considerably the period during which you must finance the purchase of your inventory and bear the interest and carrying charges therefor. This is so because you could time your orders from the MMC importer-distributor company so that you purchase vehicles only a short time before you anticipate making sales to retail purchasers. Given the difficulties which MMC understands you presently face in obtaining adequate letter of credit and floor plan financing for placing new orders with MMC, the establishment of an MMC importer-distributor company might be the foundation for persuading your banks to renew the extension of vehicle purchasing and vehicle financing credit.

The MMC importer-distributor company would also agree to purchase from MMC the 1981 and 1982 model year stock which you previously ordered and which remains in Japan. Thus, you would be relieved of your responsibility for purchasing this stock and, except for reimbursing MMC for distress unit penalties that are owed with respect to this stock, there would be no further obligation to pay MMC for these units.

Given the business risks that the MMC importer-distributor company will assume in purchasing vehicles from MMC and stocking them in Puerto Rico for its own account and also in relieving you of your responsibility for paying MMC for the Japan-stocked vehicles that you previously ordered, the MMC importer-distributor company must be able to establish a dealership body, throughout the island, of which each of you might be a part. The MMC importer-distributor company would offer each of you the opportunity to become part of an island-wide dealership body and the importer-distributor would be prepared to enter into its standard form, non-exclusive dealership agreement under which each of you would become a dealer for Mitsubishi-badged vehicle sales throughout the island. It should be noted that MMC and its importer-distributor company would have no objection to your continuing to act as importers and distributors of Chrysler vehicles while you act as dealers for MMC vehicles.

The importer-distributor company would also be prepared to discuss the possibility of leasing premises from you and obtaining vehicle-processing services from you for a period and on terms and conditions that would be mutually acceptable to the parties to such a transaction.

Attachment A lists the prices at which MMC's importer-distributor company would be willing to sell to its dealers

the 1981 model year vehicles which you previously ordered, which remain in Japan and which, if this package of proposals is accepted, the MMC importer-distributor company would purchase for resale in Puerto Rico. These prices will afford the importer-distributor company's dealers substantial per-vehicle discounts from the ordinary dealer price which, in the aggregate, would amount to over $1 million. Attachment B sets forth the prices at which MMC's importer-distributor company would sell 1982 model year vehicles to its Puerto Rican dealers.

MMC thinks that the above package of proposals provides a very good foundation for solving, in a way which is fair and equitable, the problems that you face. This package will replace the special assistance program which MMC presented to you in mid-January 1982 and which MMC has withdrawn because its conditions were not met.

MMC looks forward to your favorable response by February 24, 1982 to its package of proposals so that as soon as possible it can obtain any required approvals and take all further steps necessary to carry out these proposals successfully.

MITSUBISHI MOTORS CORPORATION

February 22, 1982

ATTACHMENT A

PROPOSED PRICES TO MMC IMPORTER-DISTRIBUTOR COMPANY DEALERS FOR JAPAN-STOCK OF 1981 MODEL YEAR VEHICLES PREVIOUSLY ORDERED FOR SALE IN PUERTO RICO

	MSRP	*Dealer Mark-Up*	*Ordinary WSDP*	*Discount*	*Special WSDP*
152AMEL	$5,250	$525	$4,725	$430	$4,295
A152AMBUL	5,500	550	4,950	430	4,520
A153AMKUL	5,850	585	5,265	430	4,835
A153AMBJL	5,850	585	5,265	430	4,835
A153AMKJL	6,120	612	5,508	430	5,078
A153AMBXL	6,650	665	5,985	430	5,555
A157AFBUL	5,850	585	5,265	430	4,835
A157AFKUL	6,200	620	5,580	430	5,150
A165AHNSL	9,000	900	8,100	920	7,180
A165AHKSL	9,280	928	8,352	920	7,432
A165AHNJL	9,000	900	8,100	920	7,180
A165AHKJL	9,280	928	8,352	920	7,432
L022PFSL	7,200	720	6,480	560	5,920
L022PKSL	7,350	735	6,615	560	6,055
L023PNUL	7,850	785	7,065	560	6,505
L023PKUL	8,100	810	7,290	560	6,730

Total Discount = $1,037,060
(2,162 units)

ATTACHMENT B

PROPOSED PRICES TO MMC IMPORTER-DISTRIBUTOR COMPANY DEALERS FOR 1982 MODEL YEAR VEHICLES

	Model	*MSRP*	*Dealer Mark-Up*	*WSDP*
	A152AMEL	$5,500	$550	$4,950
	A153AMBUL	5,750	575	5,175
NE24	A153AMKUL	6,100	610	5,490
	A153AMBJL	6,100	610	5,490
	A153AMKJL	6,370	637	5,733
	A153AMBXL	6,900	690	6,210
	A156AFBUL	6,100	610	5,490
NE44	A157AFKUL	6,450	645	5,805
	A157AFKJL	6,720	672	6,048
	A165AHNSL	9,400	940	8,460
	A165AHKSL	9,680	968	8,712
YD23	A165AHNJL	9,400	940	8,460
	A165AHKJL	9,680	968	8,712
	L022PFSL	7,400	740	6,660
	L022PNSL	7,550	755	6,795
SP27	L023PNUL	8,050	805	7,245
	L023PKUL	8,300	830	7,470

Motion to Dismiss and for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

TO THE HONORABLE COURT:

Plaintiff and Defendant on Counterclaim Mitsubishi Motors Corporation ("MMC"), based upon the annexed affidavit of Mitsuaki Mitsukuri, the statement of undisputed facts pursuant to local rule 8.N and the memorandum of law and upon all the files and proceedings herein, respectfully moves this Court for an order dismissing the Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Counterclaims pursuant to Rule 12 of the Federal Rules of Civil Procedure ("F.R.C.P.") and granting summary judgment on the First, Second, Third, Fifth, Seventh, Eighth and Ninth Counterclaims pursuant to Rule 56, F.R.C.P.

In San Juan, Puerto Rico, this 12th day of July, 1982.

McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA
G.P.O. Box 4225
San Juan, Puerto Rico 00936
Telephone: (809) 753-3000

By: /s/ SAMUEL T. CESPEDES
Samuel T. Cespedes

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

By: /s/ ROBERT L. SILLS
Robert L. Sills

[Certificate of Service omitted in printing]

Affidavit of Mitsuaki Mitsukuri

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

MITSUAKI MITSUKURI, being duly sworn, deposes and says:

1. I am the General Manager of the Latin America Group of Plaintiff and Defendant on Counterclaim Mitsubishi Motors Corporation ("MMC"). As such, I am the person in charge of the sale of MMC products in Puerto Rico. I make this affidavit on personal knowledge in support of MMC's motion for an order granting summary judgment on the First, Second, Third, Fifth, Seventh, Eighth and Ninth Counterclaims of Defendant and Plaintiff on Counterclaim Soler Chrysler-Plymouth, Inc. ("SCP") pursuant to Rule 56(a) of the Federal Rules of Civil Procedure.

A. MMC DID NOT SHIP THE VEHICLES DESCRIBED IN THE COUNTERCLAIMS BECAUSE SCP DID NOT PROVIDE FOR THEIR PAYMENT.

2. MMC and SCP began their commercial dealings in or about October 1979. On October 31, 1979, SCP and Chrysler International, S.A. ("CISA"), a subsidiary of Chrysler Corporation ("Chrysler"), entered into a Distributor Agreement that granted SCP a franchise to distribute certain Chrysler vehicles manufactured by MMC in the metropolitan San Juan area. A copy of the Distributor Agreement is annexed hereto as Exhibit A. Article 14 of the Distributor Agreement provided that "[i]f [SCP] requests diversion of products or fails to accept any ship-

ment of products . . . [CISA] has the right to cancel in whole or in part any and all of [SCP's] orders for Products."

3. At the same time that SCP and CISA executed the Distributor Agreement, MMC, CISA and SCP executed a Sales Procedure Agreement. That agreement was intended to facilitate SCP's ordering of MMC-manufactured Chrysler vehicles pursuant to the Distributor Agreement. The Sales Procedure Agreement, a copy of which is annexed hereto as Exhibit B, explicitly provided in Article I(F) that SCP must furnish a letter of credit before MMC had any obligation to ship ordered vehicles, as follows:

> "Payment for Products to MMC by [SCP] shall be made, unless otherwise agreed upon, by irrevocable, confirmed, without recourse, unrestricted and at sight letters of credit to be opened in favour of MMC through reputable first class banks acceptable to MMC. Such letters of credit shall be valid for at least 120 days after they are opened and shall be opened within 15 days after [SCP's] receipt of MMC's acceptance as provided in paragraph D(2) of this Article or by such other earlier date as may be required by MMC. [SCP] shall notify MMC promptly of the opening of such letters of credit. If [SCP] fails to provide such letters of credit, MMC shall have the option of reselling the contracted goods for [SCP's] account, holding the goods for [SCP's] account and risk and/or cancelling the Export Sales Contract relating to such goods and claiming for damages caused by [SCP's] default."

4. The facts are (a) that MMC did not ship 966 vehicles ordered by SCP because SCP instructed MMC in writing not to ship them, except for 204 of those vehicles for which SCP belatedly requested shipment on November 23, 1981, and (b) that SCP failed to provide a valid letter of credit to pay for the vehicles ordered.

1. *SCP attempted to cancel its orders for MMC vehicles.*

5. During late 1980 through early 1981, other MMC personnel and I spoke with officers of SCP and warned them that SCP's orders for MMC vehicles were too high in light of the anticipated "softening" of the automobile market in Puerto Rico. Despite those warnings, SCP placed substantial monthly orders for 1981 model year MMC vehicles during the period from January 1981 through July 1981, as follows:

Month of Order	*Production Quantity*	*Approximate Scheduled Date for Shipment*
ORDERED AND SHIPPED:		
January	400	Feb/March
February	100	Mar/Apr
March	177	Apr/May
April	100	May/June
	777	
ORDERED BUT UNSHIPPED:		
May	204	June/July
June	262	July/Aug
July (1982 model year)	500	Aug/Sept
	966	
	1,743	

Copies of the Firm Orders of SCP for these 1,743 vehicles are annexed hereto as Exhibit C.

6. MMC confirmed its compliance with those orders by delivering "export sales contracts" to SCP. Copies of those contracts for SCP's orders from January through July are annexed hereto as Exhibit D.

7. As the "softening" in the Puerto Rican automobile market became more apparent, Soler, by telex dated May 27, 1981, requested that MMC (a) cancel its June 1981 production order of 262 units, included in the 966 units referred to in SCP's counterclaim, (b) postpone by 30 days shipment of vehicles already manufactured, pursuant to its April and May production orders and (c) provide unspecified financial assistance with respect to "floor planning cost". That telex, a copy of which is annexed hereto as Exhibit E, stated in part:

> "Continued saftening [sic] of sales due to political bad news announcing cut in food coupons and discontinuance of Federal program known as CETA Plan has caused overstock position forall [sic] Puerto Rico distributors for Japanese autos.
>
> "This continued with sudden increase in prime rate . . .
>
> "Mr. Mitsukuri, we request MMC help us by postponing April and May production shipments 30 days and cancellation of last month of 1981 production."

8. As this crisis in SCP's business continued, SCP, by telex dated July 22, 1981, a copy of which is annexed hereto as Exhibit F, stated to MMC:

> "At this time we must request tgat [sic] you do not repeat do not book shipment for August since *we have very serious problems with our bank*. I propose shipping schedule be set back by one month for each shipment. Even though we did open L/C *please do not ship* but only as requested. In addition to this request for furtherdelay [sic] in shipments we still wish to open 45 day L/C to reduce interest payments to the bank." (emphasis added)

9. Despite its strong desire to receive payment for the shipment of these vehicles, MMC complied with SCP's request and refrained from shipping the units included in the May, June and July orders, a total of 966 vehicles.

10. On October 31, 1981, the Distributor Agreement and the Sales Procedure Agreement expired by their terms.

11. At no time prior to November 23, 1981 did SCP request shipment of any of the 966 units produced pursuant to its Firm Orders.

12. By telex dated November 23, 1981, SCP suddenly, and for the first time since May, 1981, requested MMC to ship to Puerto Rico 204 of the vehicles, the order for May production, being held for it in Japan. A copy of this telex is annexed hereto as Exhibit G. SCP, in its telex, purported to arrange for payment for these vehicles by a letter of credit from the Bank of America opened on or about July 16, 1981 and extended on or about October 9, 1981 (the "Letter of Credit"). A copy of the Letter of Credit is annexed hereto as Exhibit H. However, despite SCP's representation, the Letter of Credit specified a final shipment date of November 16, 1981. The Letter of Credit had, therefore, become inoperative one week before SCP's purported request for shipment in reliance upon it. SCP's bank, accordingly, would not have paid MMC if the vehicles requested in SCP's telex had been shipped.

13. MMC responded to SCP by telex dated November 27, 1981, a copy of which is annexed hereto as Exhibit I. In relevant part, that telex stated:

> "Although in your telex, you requested us to ship 204 units of '81 models by the time the existing L/C expires, we understand that because you have been in overstock situation, you have been appre-

ciating our postponement of the captioned shipment and our not utilizing the existing L/C.

"However, *if you are now in a position to take the units immediately, we would of course be happy to arrange a vessel to bring you the units.* As you know quite well, the arrangement of a vessel would require a certain lead time and it would be probably impossible to contract with the shipping line for the vessel to realize the capitioned shipment by December 1 when your L/C expires. Therefore, *we would request you to amend the L/C to extend the expiration date and the last shipment date until December 31, 1981*, by which time we could arrange a vessel and realize the captioned shipment.

* * *

"Therefore, if you should wish to get 204 units shipped definitely in December, *we would further request you to amend the L/C* to increase its value amount to Dlrs. 1,026,730.00 (1,026,730.00)." (emphasis added)

14. As reflected in MMC's November 27, 1981, telex, MMC had learned that the shipping company would impose a 60% surcharge upon a shipment of fewer than 500 vehicles. This surcharge would have cost SCP from $247 to $354 per vehicle. I understand that, at the time of this request, SCP's average gross margin per vehicle was approximately $350.

15. By telex dated December 16, 1981, SCP purported to respond to MMC's telex of November 27, 1981. A copy of this telex is annexed hereto as Exhibit J. SCP's telex, however, was wholly inadequate because it (a) failed to refer to any operative letter of credit and (b) failed to confirm that SCP would pay the 60% surcharge imposed by the shipping company. Thus, while SCP purported to

respond to MMC's telex of November 27, 1981, it once again failed to confront its own lack of financing.

16. Thereafter, SCP failed to procure any further letter of credit, as required by Article I(F) of the Sales Procedure Agreement.

17. By telex dated February 12, 1982, SCP, together with the two other CISA distributors in Puerto Rico, disclaimed responsibility for the ordered but unshipped vehicles. A copy of this telex is annexed hereto as Exhibit K. It states, in pertinent part:

> "We would like to again point out that early in April, 1981, Boricua Motors asked you to cancel, or, if impossible to do so, convert those units [including 466 vehicles manufactured for SCP] to 1982 models. Later on all three distributors again asked you to cancel production of those units. We consider that your refusal to act on our instructions was unreasonable, therefore, *we do not feel responsible for these vehicles.*" (emphasis added)

It is striking that, as recently as February 12, 1982, SCP (a) insisted that MMC should have cancelled production of the vehicles held for it in Japan and (b) sought to avoid financial responsibility for those vehicles. That telex fully confirms the falsity of SCP's contention in its counterclaims that MMC unjustifiably refused to ship it vehicles.

2. *SCP voluntarily ceased its business.*

18. During a meeting held in San Juan on February 22, 1982, at which MMC and SCP were discussing means to improve MMC sales performance and further financial assistance to SCP, attended by Mr. Joaquin Soler, Sr., Mr. Joaquin Soler, Jr. and Mr. Andres Soler for SCP and Mr.

Ueda, Mr. Imajo, Mr. Goto, Mr. Matsuda, and myself for MMC, Mr. Joaquin Soler, Jr. stated that SCP no longer wished to continue selling MMC vehicles and that SCP refused to conduct any further business with MMC.

19. On or about February 23, 1982, the day following that meeting, SCP voluntarily surrendered to its bank, in partial satisfaction of its debt, 412 MMC vehicles already in its inventory which it could not sell. Based on its January and February 1982 sales, those units represented approximately a four month supply of vehicles.

20. The foregoing demonstrates that the alleged "refusal" to ship ordered vehicles, which lies at the heart of SCP's counterclaims, is a complete distortion of the facts. SCP exercised poor business judgment concerning the number of MMC vehicles it could sell, and completely defaulted on its obligation to provide an operative letter of credit. Its attempt to shift responsibility to MMC for its own failings should be rejected, and its claims dismissed.

B. MMC DID NOT FORCE SCP TO ORDER VEHICLES.

21. SCP has apparently now abandoned its pleaded claims that MMC withheld vehicles from it. In its latest submission to this Court, SCP, in a complete about face, takes the position that MMC forced SCP to order unwanted vehicles to meet its minimum sales volume ("MSV"). This new contention is as bogus and contrived as its predecessor.

22. As is customary in the automobile business, MMC and CISA established a MSV for SCP, after negotiation with SCP. The MSV established a target figure for sales of MMC vehicles in SCP's territory.

23. Because SCP was a new entrant in MMC manufactured Chrysler vehicles in the Puerto Rican market for

the 1980 model year, its MSV for that year was set at the very conservative level of 1,992 units. A copy of SCP's agreement respecting its 1980 MSV is annexed hereto as Exhibit L.

24. In part because the automobile market was very strong through the 1980 model year, and in part because SCP's MSV had been fixed at a very low level, SCP substantially exceeded its requirements during that model year.

25. On or about June 24, 1980, SCP, MMC and CISA agreed on an MSV for the 1981 model year. A copy of that agreement is annexed hereto as Exhibit M. In response to the very agressive marketing plans of SCP, that MSV was fixed at a level of 4,750 vehicles. At that time, the automobile market in Puerto Rico was very strong. The allegation of SCP that this MSV was "imposed" in late 1980 (*See* Affidavit of Joaquin Soler, Jr., sworn to June 29, 1982, ¶ 8 ["Soler Affidavit"]), is demonstrably false.

26. As reflected in Exhibit C to the Soler Affidavit, MMC originally proposed an MSV for the 1981 model year of 4500 vehicles, including 250 model SP-27 pickup trucks. As reflected in Exhibit M hereto, that MSV was increased to 5000 vehicles. That increase was made at SCP's request. At a time of tight supply in MMC vehicles, SCP insisted upon the inclusion of an additional 500 model NE-44 (four-door Champ) units. After MMC learned of a potential customs difficulty with the SP-27 pickup truck, it was eliminated entirely from the MSV, so that the final figure for the model year was 4,750, a net increase of 500 vehicles made at SCP's request.

27. The timing of SCP's orders is also fatal to its current claim. Prior to the execution of the 1981 model year MSV, SCP had already ordered 1851 units of 1981 model vehicles,

39% of its MSV. Fifteen days after that date, SCP ordered an additional 1000 vehicles. It is evident that all parties believed the market to be very strong at that point, and SCP's large orders are wholly inconsistent with its assertion that it was "forced" to order vehicles to meet an MSV "imposed" upon it.

28. By early 1981, as the market weakened, I orally advised all three CISA distributors that MMC would not seek to enforce their MSV's, and urged them to reduce their orders.

29. Moreover, MMC has not taken any action against SCP based on its MSV. It has never threatened sanctions or attempted to terminate SCP for that reason, and the complaint in this action does not even mention the MSV. SCP's belated attempt to manufacture a claim out of its MSV, especially viewed in light of its contradictory pleaded claims, should be rejected.

C. SCP WAS NOT AN MMC DISTRIBUTOR.

30. Article 26 of the Distributor Agreement between CISA and SCP provided:

> "[CISA] and [SCP] agree that [CISA] may at its option, forward orders received from [SCP] pursuant to this Agreement to its parent company, Chrysler Corporation, or to any subsidiary, associated or affiliated company (hereinafter called "SUPPLIER") [MMC] which will then sell the Products covered by such order directly to [SCP]. [CISA] and [SCP] hereby acknowledge and agree that, unless otherwise agreed in writing, any such direct sales between SUPPLIER and [SCP] will be governed by the terms and conditions contained on the order form and in this Agreement and that any *such sales*

> *will not constitute the basis of forming a distributor relationship between* SUPPLIER *and [SCP]*. . . ." (emphasis added)

31. In addition, Article X of the Sales Procedure Agreement stated:

> "This Agreement does not create the relationship of principal and agent between [SCP] and MMC and under no circumstances is either party to be considered the agent of the other. Further, [SCP] and MMC hereby recognize that any direct sales made by MMC to [SCP] pursuant to this Agreement shall under no circumstances be construed as forming a distributor relationship between [SCP] and MMC."

32. When these two agreements were negotiated and signed in October of 1979, MMC understood them to mean that SCP agreed that it held its franchise from CISA, and not MMC. MMC merely manufactured certain vehicles for Chyrsler, and SCP was never a dealer or franchisee of MMC.

D. MMC DID NOT "COERCE" OR "INTIMIDATE" SCP.

33. In its Answer and Counterclaims, SCP alleges in only one meaningful instance, paragraph 75, that it has been "coerced and intimidated," a necessary element of its claim under the Automobile Dealer's Act. Paragraph 75 provides:

> "In addition, Mitsubishi has coerced and intimidated Soler by purporting to make offers of assistance to Soler and failing to carry through same, by thereafter acting in a manner intended to diminish and eventually destroy Soler's business, and in then attempting to wrongfully appropriate for itself the

market and distributorship which Soler developed through its efforts in Puerto Rico." [1]

34. It is true that one of the many proposals made by MMC in the course of its efforts to salvage the sales of the Puerto Rican CISA distributors included a plan to set up a single importing and distributing company. This company would have in turn sold vehicles to the three existing CISA distributors. A copy of MMC's proposal to the CISA distributors is annexed hereto as Exhibit N. In connection with that proposal, MMC offered the CISA distributors (a) a waiver of the very substantial sum owed to it for distress unit penalties and (b) a further discount of $480 per vehicle on the 2,162 units of 1981 model year vehicles then held in Japan to induce them to enter into the proposed arrangement.

35. MMC's proposal, however, was not one that it sought unilaterally to impose on the CISA distributors. It was offered merely as one proposal, among many, for restoring MMC's sales volume in Puerto Rico, which the three CISA distributors had squandered. There was no coercion in MMC's proposal, and no CISA distributor was ever informed, directly or indirectly, that its rights would be terminated or other sanctions imposed if it did not accede to MMC's proposal. In fact, the two other distributors have continued their businesses with MMC's financial assistance after rejecting MMC's proposal. Thus, MMC's proposal was in all respects legal and proper.

36. The fact is that SCP simply abandoned any interest in selling MMC vehicles under any arrangement. SCP

[1] In its Supplemental Memorandum in Response to Plaintiff's Motion, SCP submits that MMC coerced it into accepting an unreasonably high minimum sales volume for 1981. For the reasons set forth above in paragraphs 21 through 29, that claim is totally without foundation.

voluntarily surrendered its business and its inventory of MMC vehicles, and its current claims of "intimidation" or "coercion" are groundless.

E. MMC DID NOT CONSPIRE WITH CISA TO DESTROY OR APPROPRIATE THE BUSINESS OF SCP.

37. The alleged conspiracy with CISA to destroy SCP's business is a complete fabrication. Far from having any desire to destroy the business of SCP, MMC went to great lengths to save it. Four examples of MMC's assistance to SCP and the two other CISA distributors are set forth below.

38. First, in or about September 1981, MMC proposed a "salesmen's incentive program" for the CISA distributors. A copy of MMC's written proposal is annexed hereto as Exhibit O.

39. By letter dated September 22, 1981, the three CISA distributors in Puerto Rico jointly wrote to MMC respecting its offer to provide a salesman's incentive plan. That letter, a copy of which is annexed hereto as Exhibit P, requested MMC to fund a cash rebate plan instead.

40. By letter dated September 25, 1981, the three CISA distributors again wrote to MMC, stating:

> "*The total combined MMC—Distributor budget for this program is $385,000.00* on a 50-50 basis.
>
> "At the sales rate as projected in the attachment this budget would be utilized completely early in December, at which time each distributor would have to fund its own program to dispose of the '81 models.
>
> "*Since none of us can open L/C's now*, this creates a shortage of NE44, YD23 and SP27 for Boricua. To supplement our inventory we will be

buying a quantity of these models from Soler and/or Ponce. This does not reflect in the attachment." (emphasis added)

A copy of this September 25, 1981 letter is annexed hereto as Exhibit Q.

41. MMC responded affirmatively to the CISA distributors' request. By letter dated October 2, 1981 it stated:

> "This is to confirm our acceptance of your proposal of Cash Rebate Program (for '81 model NE24) in your letter dated Sept. 25, 1981 which was addressed to Mr. Y. Goto. The program was discussed and already agreed to between you on behalf of all three distributors and I during my stay in Puerto Rico.
>
> • • •
>
> "*We are expecting your successful sales on this program and would like to review its effectiveness one month later to extend* the program for another month." (emphasis added)

A copy of the October 2, 1981 letter is annexed hereto as Exhibit R. By telex dated November 4, 1981, MMC notified SCP that it would extend the cash rebate program for the month of November. A copy of that telex is annexed hereto as Exhibit S.

42. Second, in August, 1981, MMC began an advertising campaign in Puerto Rico, utilizing the services of the Badillo-Compton Agency. Pursuant to the terms of the agreement for that advertising campaign, MMC expended more than $300,000 toward local advertising for the three CISA distributors.

43. Third, by letter dated February 1, 1982, MMC wrote to Chrysler seeking its aid in assisting the three CISA

distributors. That letter, a copy of which is annexed hereto as Exhibit T, provided that:

> "As set forth in the attachment, MMC is prepared to incur costs of approximately $3 million in order to revitalize the distributors' sales momentum and help the distributors out of their present difficulties."

Furthermore, as the February 1 letter makes clear, the goal of the assistance plan proposed by MMC was to enable the three CISA distributors to import the vehicles held for them by MMC in Japan by (a) granting additional discounts to the distributors of $1,000,000; (b) releasing the distributors from their obligations to pay $1,200,000 in accrued distress unit penalties; and (c) directly expending $500,000 for television and print advertising.

44. Fourth, MMC provided critical financial assistance to Chrysler Plymouth de Ponce, Inc. ("CPP"), to enable it to purchase 395 of the 412 vehicles previously surrendered to its bank by SCP by guaranteeing CPP's debt to its bank. Without MMC's guaranty, financing for that transaction would not have been available. In the period since then, MMC has guaranteed, in the form of "repurchase agreements", an additional $5,268,389 in loans to CPP and Boricua Motors Corp. ("BMC") to enable BMC and CPP to purchase 1,500 of the vehicles previously held in Japan.

45. The documents quoted above demonstrate that at the time of the alleged "conspiracy" to destroy SCP's business, MMC had taken voluntary steps involving substantial sums of money to revive the business of all three CISA distributors. MMC's willingness to fund these programs is a graphic demonstration that its efforts were aimed at extricating the three CISA distributors from the difficulties in which their own poor business judgment had placed them, and not at destroying their businesses, as alleged by SCP.

F. MMC'S UNILATERAL DECISION NOT TO ALLOW TRANSSHIPMENT OF VEHICLES BY SCP WAS REASONABLE AND PROCOMPETITIVE.

46. Article 1 of the Distributor Agreement provides:

> "Subject to the provisions of this Agreement, [CISA] grants to [SCP] the non-exclusive right to purchase Products from [CISA], and [SCP] agrees to buy Products from [CISA], for resale within the following described territory (hereinafter called Sales Area): METROPOLITAN SAN JUAN, PUERTO RICO. . . ."

47. As the market for automobiles in SCP's sales area contracted during late 1981, SCP allegedly sought to sell in the mainland United States or Latin America the MMC vehicles it had previously ordered.

1. *MMC's action promoted interbrand competition.*

48. The most recently published sales figures demonstrate that MMC has less than a 3% share of the world automobile market. According to the "Motor Vehicle Statistics" published by the Japan Automobile Manufacturers Association, there were 37,589,502 cars and trucks produced worldwide in 1982. MMC produced 1,094,793 of these. Thus, MMC had only a 2.9% share of the worldwide automobile market in 1981.

49. MMC had even a smaller share of the market in the mainland United States. According to Ward's 1982 *Automotive Yearbook,* 10,953,730 new cars and trucks were sold in the mainland United States in 1981. MMC, through its agreement with Chrysler, sold only 144,842 vehicles. Thus, MMC had only 1.3% penetration in this market.

50. MMC is therefore only one small manufacturer in a vigorously competitive market. MMC's refusal to consent to sell cars to SCP for resale outside its primary sales territory was an appropriate unilateral marketing decision designed to promote interbrand competition, by assuring MMC distributors and dealers of sufficient profitability to compete effectively with representatives of other automobile manufacturers.

2. *Allowing SCP to ship the vehicles without assurance of proper handling or warranty service would substantially impair the goodwill of MMC.*

51. MMC's success in the automobile business depends upon the goodwill it can develop with the consuming public. The development of this goodwill, in turn, rests on the public's perception that it consistently sells quality merchandise and provides the service to stand behind what it sells.

52. In September 1981, MMC learned that SCP was attempting to find a buyer in South or Central America for the 412 vehicles it held in Puerto Rico. In its counterclaims, SCP apparently now alleges that it sought to ship those vehicles, plus its "Japan Stock" of 966 units, to the mainland United States as well. MMC believed that such actions would have significantly impaired the worldwide goodwill of MMC. The reasons for that belief were expressed to SCP by letter dated September 4, 1981, a copy of which is annexed hereto as Exhibit U. These reasons are summarized below:

> (a) MMC had no assurance that the vehicles would be shipped and received in a satisfactory condition. Shipment of automobiles by sea can result in significant damage to the vehicles unless diligent precautions are taken to protect them.

(b) MMC understood that SCP had not made provisions to have the vehicles inspected, repaired or otherwise serviced once they reached their destination. Regardless of how well they are transported, vehicles shipped by sea will generally suffer some damage. This damage is usually repaired by a reputable port service concern after thorough inspection. In addition, a protective wax coating must be applied to the vehicles before shipment and then removed after the voyage. MMC had not been informed that SCP had made arrangements with such a service. After expressing this concern to SCP, MMC received no assurance to the contrary.

(c) MMC's goodwill would also have been impaired by the lack of warranty service for transshipped vehicles. MMC does not now have its own distribution systems in the mainland United States, but relies on Chrysler, through its Dodge and Chrysler-Plymouth dealers, to perform that function. Neither Chrysler nor its dealers, however, have any contractual obligation to provide warranty service on MMC vehicles shipped into the country from outside the United States. MMC was informed by Chrysler that its dealers would have refused to provide warranty service on the SCP vehicles if they had been shipped to the mainland United States. This would again have resulted in the sale of a product of less than the desired quality and an impairment of MMC's goodwill in the United States. Given the fact that MMC intended in the near future to establish its own network of distributors, such a result could have been catastrophic.[2]

[2] SCP also failed to provide any assurance that the vehicles would receive proper service if shipped to South or Central America.

(d) If SCP had attempted to ship the vehicles to South or Central America, a problem of equal magnitude would have occurred. The cars MMC built for SCP for resale in Puerto Rico require unleaded high octane gasoline. If this type of gasoline were not used, serious damage to the engines of the vehicles would have resulted. Consumers who purchased these vehicles would have been dissatisfied and the goodwill of MMC eroded. Other than in Puerto Rico, only leaded fuel, and a small amount of low-octane unleaded fuel, is available in Latin America. These considerations fully justified MMC's refusal to consent to SCP's proposed transshipment.

3. *It would have been illegal for SCP to ship the vehicles to the United States.*

53. The vehicles that SCP ordered and MMC manufactured were built for resale in Puerto Rico, and accordingly were not equipped with heaters or defoggers. SCP never requested MMC to make such modifications, and MMC had no obligation to provide those modifications at its expense. In addition, MMC did not believe that SCP was licensed as an automobile dealer or distributor anywhere besides Puerto Rico. The illegality of the sale proposed by SCP fully justified MMC's refusal to consent to it.

4. *The transaction proposed by SCP might have violated Japanese and American Trade Policy.*

54. It also appeared that shipment of vehicles from Puerto Rico to the mainland might have had a deleterious impact on MMC under Japan's foreign trade policy. On or about May 1, 1981, the Japanese government imposed

restrictions on the export of automobiles to the United States. Separate quotas were imposed for vehicles shipped to the mainland and to Puerto Rico. MMC believed that any transshipment from Puerto Rico to the mainland might have jeopardized MMC's standing with Japanese trade authorities, by making it appear that the company was exploiting a "loophole." I submit that this constitutes a further justification for MMC's decision.

G. MMC Has Reimbursed SCP for Warranty Service.

55. MMC has always reimbursed its dealers in general and SCP in particular for warranty service they have actually provided. At the present time, MMC believes it has paid to SCP all warranty claims due and owing to it.[3]

Conclusion

56. The foregoing amply demonstrates that there is no question of material fact respecting the First, Second, Third, Fifth, Seventh, Eighth and Ninth Counterclaims, on either the theory pleaded or the new factual argument contrived by SCP in its reply papers respecting MMC's motion to compel arbitration. I respectfully request that the Court enter an order gaining summary judgment against SCP on each of those claims.

By: /s/ [Illegible]
Mitsuaki Mitsukuri

[Subscribed and sworn to July 9, 1982]
[Jurat omitted in printing]

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[3] Well after the commencement of this action and the assertion of SCP's counterclaims, an employee of MMC sent a letter to SCP acknowledging that approximately $18,000 in warranty reimbursement claims were being processed. MMC has subsequently written to SCP, informing it that (a) the validity of those claims is being investigated and (b) that all further payments are being suspended pending the resolution of this action.

Exhibit M to Mitsukuri Affidavit

June 24, 1980

Soler Chrysler Plymouth Inc.
Carretera No. 2, KM 6.8
Pueblo Viejo, Guaynabo
Puerto Rico

Dear Sir,

We refer to the Distributor Agreement Automotive products (the "Distributor Agreement") dated as of November 6, 1972 between you and Chrysler International S.A. ("CISA") and the Sales Procedure Agreement dated as of October 31, 1979 among you, CISA and Mitsubishi Motors Corporation ("MMC"). You have agreed to the minimum sales volume ("MSV") set forth below for the period there specified:

MMC Vehicle Model	*Per Annum*
NE-24	3,000
NE-44	1,700
YD-23	50
[SP-23]*	[250]*
TOTAL:	[5,000]**

Period: From November 1, 1980 through October 31, 1981 (the "1981 Model Year").

You agree that achievement of the MSV for the 1981 Model Year set forth above is an essential obligation of yours under the Distributor Agreement and failure to achieve such MSV would adversely and substantially affect the interest of CISA and MMC in promoting the marketing and distribution of Motor Vehicles in Puerto Rico. You further agree that achievement of the minimum sales volume

[* Deleted by handwritten notation]

[** 4,750 substituted by handwritten notation]

set forth above will be necessary for you to achieve a satisfactory level of sales and profits for you to continue as a distributor of Motor Vehicles.

CISA hereby acknowledges to and agrees with MMC that MMC will in no respect be liable to CISA in the event that the distributor named below fails to achieve the MSV for the 1981 Model Year set forth above.

Very truly yours,

MITSUBISHI MOTORS CORPORATION
By: /s/ [Illegible]

CHRYSLER INTERNATIONAL S. A.

By: /s/ F.P. GESSLER

By: /s/ W. FURRER

F.P. GESSLER W. FURRER
Authorized Signatories

The terms of this letter
are hereby agreed to:

SOLER CHRYSLER PLYMOUTH INC.

By: /s/ [Illegible]

Exhibit U to Mitsukuri Affidavit

September 4, 1981
By hand.

Soler Chrysler Plymouth, Inc.
Carretera No. 2 KM. 6.8
P.V. San Juan, Puerto Rico 00917

Gentlemen:

We refer to certain telexes dated August 19, 1981 from the San Juan office of the Bank of America ("BOA") to certain other Latin American BOA offices, which solicited customers for 1,300 vehicles manufactured by Mitsubishi Motors Corporation ("MMC") now held by a BOA customer in Puerto Rico. We understand that Soler Chrysler-Plymouth Inc. ("SOLER") is that customer, and that the telexes were dispatched at Soler's request.

MMC will not consent to any transaction, by which SOLER transships any MMC vehicles held by it in Puerto Rico to any other location in Latin America, because of the damage such transshipment would cause to MMC's name, reputation, goodwill and trademarks.

As you know, all MMC vehicles presently held in SOLER's inventory are designed for use with high-octane unleaded fuel. We understand that virtually all gasoline available in Latin America other than in Puerto Rico contains lead. The use of such fuel in these MMC vehicles will cause serious damage, and can be expected to make the useful life of the vehicle very brief. We are not aware of any practical means for repairing such damage, and do not believe that it would be feasible to modify the vehicles to run on leaded fuel. Furthermore, we understand that the small amount of unleaded fuel available in Latin America

is generally of low octane, so that the vehicles in question would appear to be seriously underpowered even if they were supplied with unleaded fuel.

The preparation of vehicles for ocean shipment and arrangements for the shipment itself require a special expertise. Even if proper procedures are followed, some damage to shipped vehicles can be expected, and any damage to the vehicles must be assessed and repaired. We have no assurance that you have such expertise or that the shipment, damage, assessment and repair of the vehicles in question would be properly carried out.

In the case of certain of the destinations you propose for the vehicles, additional equipment (such as heaters and defoggers) would have to be installed before sale. MMC is concerned that such equipment may not meet MMC's standards for safety or efficiency, might be installed in an unworkmanlike manner, or might violate local motor vehicle laws.

Moreover, we are not aware that appropriate measures have been or could be taken to ensure proper after-sales service of the vehicles. As you are aware, providing such service is an essential element in maintaining a vehicle manufacturer's goodwill.

Accordingly, the transaction described in BOA's telex of August 19 would immediately and irreparably damage MMC's name, reputation, goodwill and trademarks by creating the false impression that MMC vehicles are of substandard quality, and would therefore constitute acts of trademark infringement and unfair competition. MMC demands that SOLER desist from taking any steps to transship any MMC vehicles now held by it in Puerto Rico. In this regard, we note that, while we do not in any way speak for Chrysler Corporation and its subsidiaries

("CHRYSLER"), the transaction you propose may violate certain agreements between SOLER and CHRYSLER or interfere with certain rights now held by CHRYSLER pursuant to agreement with MMC.

MMC is, of course, aware of SOLER's current financial difficulties, and will entertain any commercially reasonable proposal made by SOLER concerning them. In this regard, we remind you that Mr. M. Mitsukuri, General Manager of the Latin America Group at MMC, will be in Puerto Rico during the week of September 6, 1981, and will be prepared to discuss any such proposal made by you.

Very truly yours,

MITSUBISHI MOTORS CORPORATION

By /s/ YASKO GOTO
Yasko Goto
Chief Representative
Latin America Representative
Office

Affidavit of Joaquin Soler

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Caption omitted in printing]

COMMONWEALTH OF PUERTO RICO }
CITY OF SAN JUAN } ss.:

JOAQUIN SOLER, being duly sworn, deposes and says:

1. I am President of Soler Chrysler-Plymouth, Inc. ("Soler"), the defendant and plaintiff on counterclaim herein, and I have direct personal knowledge of the facts and circumstances set forth herein. I make this affidavit in opposition to Mitsubishi Motor Corporation's ("Mitsubishi") motion to dismiss and for summary judgment.

2. There are numerous questions of fact critical to the ultimate disposition of the within dispute which remain unresolved. I have been informed by counsel that under such circumstances a motion of this kind should be denied, in order to permit discovery proceedings to be had to develop information with which Soler can further justify its opposition to the motion.

3. Mitsubishi asks this Court to put on blinders. It asks this Court to focus only on the claim it has sought to arbitrate, that is, that Soler has failed to pay for vehicles that it had ordered. I respectfully submit to this Court that the controversy is not as clear cut and simple as Mitsubishi suggests.

4. The problems that led to this litigation resulted from a series of events which began at the inception of the relationship between the parties and which have continued

to the present day. The issues raised in this lawsuit are not capable of resolution on a motion for summary judgment. They did not, as Mitsubishi seemingly implies, occur in a vacuum.

5. Throughout the period in question Mitsubishi has engaged in a course of conduct designed to wrongfully usurp and misappropriate the good will, reputation and market position of Soler. While it would be impossible, at this time, and without the benefit of discovery, for Soler to fully document each and every one of its claims, certain things are clear.

6. It is clear that Mitsubishi, Chrysler and Chrysler International, S.A. ("C.I.S.A.") have entered into an agreement which, among other things, unlawfully prevents the transshipment of Mitsubishi vehicles from Puerto Rico to the mainland United States. The benefits of such an agreement to both Mitsubishi and Chrysler are readily apparent.

Chrysler obtains the benefit of acting as Mitsubishi's distributor in Puerto Rico (where Chrysler has had poor sales; See Exhibit "A"—Chrysler had 4% of the sales in Puerto Rico for the 1981 calendar year) without having to face direct competition with Mitsubishi on the mainland.

Mitsubishi, on the other hand, wanted to develop a market for its vehicles without incurring the expenses of developing its own distributor network. Once the market had been developed Mitsubishi would then seek to avoid the expenses incurred in utilizing a middleman and dispose of the distributor with whatever means were at its disposal to usurp that role for itself.

7. Whatever other reasons may have prompted the actions of Mitsubishi, Chrysler and C.I.S.A. can only be uncovered once Soler has been given an opportunity to conduct discovery. For this reason alone, the within motion should be denied.

Factual Background

8. The business relationship between Soler and Mitsubishi was established pursuant to the execution of a Sales Procedure Agreement dated October 31, 1979 to which C.I.S.A. was a party. (A copy of the Sales Procedure Agreement is annexed to the affidavit of Mitsuaki Mitsukuri as Exhibit "B".) Soler and C.I.S.A. also executed a Distributor Agreement dated the same date. (A copy of the Distributor Agreement is annexed to the affidavit of Mitsuaki Mitsukuri as Exhibit "A".)

9. Under the terms of said agreements Soler was granted the right to purchase vehicles and automotive products manufactured by Chrysler and Mitsubishi for resale.

10. Pursuant to the agreement entered into between the parties, Soler was obligated to sell a minimum number of Mitsubishi vehicles during any one model year (a minimum sales volume). The failure to achieve such a minimum level of sales would purportedly provide a basis for Mitsubishi to seek to terminate its agreement with Soler.

11. Soler was expected to sell 1,992 Mitsubishi vehicles during the 1980 model year to fulfill the then requirements of the minimum sales volume. (See Exhibit "B" annexed hereto).

12. In order to promote and develop its franchise Soler expended considerable time and large sums of money and by virtue of its efforts Soler successfully met and exceeded its minimum sales volume for the 1980 model year. Soler's efforts established a large and profitable distributorship and dealership. In so doing Soler enhanced the goodwill, market penetration and reputation of the Chrysler and Mitsubishi products, as acknowledged by Mitsubishi in its telex of September 3, 1980, a copy of which is annexed hereto as Exhibit "C".

13. Thereafter, Soler received notice from Mitsubishi informing Soler that for the model year 1981, commencing November 1, 1980, Soler was obligated to achieve a minimum sales volume of 4,500 Mitsubishi vehicles. (A copy of this notice is annexed hereto as Exhibit "D".) This represented an increase of some 226% over the minimum sales volume Soler was obligated to achieve during the previous model year.

14. When Soler learned, for the first time, that four-door vehicles (NE-44) were available, Soler requested that 500 four-door vehicles be *substituted* for 500 two-door vehicles (NE-24). *At no time did Soler request that the minimum sales volume be increased.* At all times, the minimum sales volume has been imposed upon Soler by Mitsubishi by virtue of its superior bargaining position.

15. When, however, Mitsubishi sent the revised minimum sales volume to Soler, it simply added 500 four-door vehicles and did not, as had been requested, reduce by 500 the number of two-door vehicles. Thereafter, when Soler learned that the custom tax on the SP-27 trucks had been increased from 4% to 25%, I refused to sign the revised minimum sales volume agreement until Mitsubishi agreed to cancel the minimum sales requirements relative to the SP-27 trucks. (See Exhibit "M" annexed to the affidavit of Mitsuaki Mitsukuri sworn to July 9, 1982.)

16. Upon information and belief, this enormous increase in the minimum sales volume Mitsubishi demanded Soler fulfill, came at a time when Mitsubishi itself anticipated a softening of the market for Mitsubishi vehicles in the island of Puerto Rico.

17. In order to meet its obligations to achieve its minimum sales volume, and avoid the loss of its franchise, Soler ordered vehicles in sufficient quantity so as to meet its

responsibilities thereunder. In total, Soler ordered approximately 4,800 vehicles for the 1981 model year. (See Exhibit "E" annexed hereto).

18. At no time did Mitsubishi (as now claimed by Mitsukuri) advise Soler that the minimum sales volume would not be enforced. On the contrary, Mitsubishi continually pressured Soler and reminded Soler of its need to comply with the minimum sales volume.

19. Mitsubishi's contention that the minimum sales volume for the 1980 model year (1,992 vehicles) was set at a conservative level is simply untrue. Prior to the agreement entered into between Soler and Mitsubishi, Atlantic Motors had held a franchise for the sale of Mitsubishi vehicles in the territory now occupied by Soler. However, in the year 1979 Atlantic had ordered only 1,086 vehicles. (See Exhibit "F" annexed hereto). Moreover of those 1,086 vehicles, more than 500 were ultimately purchased and sold by Soler. (See Exhibit "G" annexed hereto). It is thus clear that the figure of 1,992 vehicles for the 1980 model year was, in fact, set at a very high level for that territory.

20. In an effort to fulfill the demands placed upon it by Mitsubishi, Soler, individually and in conjunction with the two other Puerto Rico dealers, actively pursued the possibility of selling these vehicles to buyers in the mainland United States and Latin America.

21. However, each and every attempt to arrange for the possible transshipment of these vehicles was repeatedly opposed by Mitsubishi and Chrysler. (See, for example, telex from Chrysler dated July 31, 1981 annexed hereto as Exhibit "H"; letter from Mitsubishi dated September 4, 1981 annexed hereto as Exhibit "I"; telexes from Mitsubishi dated February 9, 1982 and February 19, 1982 annexed hereto as Exhibit "J" and "K" respectively.)

22. Although Mitsubishi and Chrysler offered various justifications for the refusal to allow for transshipment, the fact remained that other Japanese manufacturers including Toyota, Honda and Datsun did allow for transshipment. (See Exhibit "L" annexed hereto). In addition Soler and the other Puerto Rico dealers informed Mitsubishi of this fact as well as the anti-trust consequences of their actions. (See telex dated February 12, 1982 annexed hereto as Exhibit "M".)

23. It soon became apparent that the primary reason for the refusal to allow for transshipment was grounded in arrangements entered into between Chrysler and Mitsubishi which served to prohibit same. (See copy of telex from Chrysler dated July 31, 1981 annexed hereto as Exhibit "H".)

24. One of the justifications offered by Mitsubishi was that it was illegal to sell vehicles which were not equipped with heaters and defoggers to the mainland United States. Soler sought to overcome Mitsubishi's objection in this regard and offered two possible solutions to this problem: (1) that pursuant to the Sales Procedure Agreement Soler purchase these parts and install them itself or (2) that Mitsubishi provide Soler with vehicles that were so equipped which, if necessary, Soler would pay for. (See copy of telex dated January 25, 1982 sent to Mitsubishi annexed hereto as Exhibit "N".)

25. The basis for Mitsubishi's rejection of the first proposal was that they could not be sure the parts would be installed in a workmanlike manner. Yet, pursuant to the Sales Procedure Agreement Soler provided warranty service on each and every vehicle sold for Mitsubishi as well as for Chrysler. The warranty service provided by Soler included work much more difficult than what appeared to be the

simple installation of heaters and defoggers and Soler had received no complaints from Mitsubishi or Chrysler concerning the performance of these services in the past.

26. Moreover, on previous occasions Mitsubishi had offered to install additional options on vehicles without charge. Nevertheless, with regard to the installation of heater and defoggers, which Soler had offered to pay for, Mitsubishi refused to do so. The reason for this refusal could only have been Mitsubishi's express desire to confine sales by Soler to its area of primary responsibility and prevent Soler from competing in the mainland market. See telex dated February 19, 1982 from Mitsubishi annexed hereto as Exhibit "K", in which Mitsubishi stated:

> "Our previous offer to install additional options without charge was intended to assist you in improving Puerto Rican sales not to facilitate sales on the mainland."

27. Likewise, Mitsubishi's claim that they received no assurance that the vehicles would be properly packed, shipped or inspected upon arrival is similarly unjustifiable. Had Mitsubishi acted in good faith and not consistently objected to transshipment there is no reason why suitable arrangements, taking into acount the legitimate interests of both sides could not have been worked out.

28. It should also be pointed out that Soler provided warranty service to any vehicle, whether manufactured by Chrysler or Mitsubishi, that had been sold in the mainland United States and brought to Puerto Rico. Likewise, when Soler's customers took vehicles purchased from Soler to the mainland they were provided with warranty service. The warranty service was provided by merely providing C.I.S.A. with the vehicle's serial number for entry on a computer. For example, see letter annexed hereto as Exhibit "O".

29. It is thus plain that the refusal to allow for transshipment was grounded in the arrangements between Chrysler and Mitsubishi and their desire that Soler not be permitted to compete in those other markets.

30. Mitsubishi also delayed making warranty reimbursements due and owing Soler which further exacerbated the problems Soler was experiencing as a result of Mitsubishi's refusal to allow for transshipment. (See telex dated April 21, 1982 annexed hereto as Exhibit "P".)

31. In an effort to alleviate these problems, Soler entered into negotiations with World Car International ("W.C.I.") for the possible sale of its franchise. However, upon information and belief, Mitsubishi unilaterally interfered with these negotiations and as a direct result thereof Soler was advised by Mitsubishi (which Soler had not invited to participate in the negotiations) in January, 1982 that W.C.I. was no longer interested in this transaction.

32. Finally, in February, 1982, the purpose behind Mitsubishi's conduct became apparent. Soler and the other Mitsubishi dealers in Puerto Rico received a proposal from Mitsubishi under which Mitsubishi sought to coerce and intimidate Soler into accepting Mitsubishi's installation of its own wholly-owned subsidiary as exclusive distributor of Mitsubishi vehicles in Puerto Rico. (See copy of the proposal annexed to the affidavit of Mitsuaki Mitsukuri as Exhibit "N".) If Soler accepted the proposal Mitsubishi advised Soler that it would dispose of the disputed 966 vehicles on its own. If Soler refused to accept the proposal, Mitsubishi would seek to hold Soler responsible for the vehicles. Soler rejected this proposal under which Mitsubishi would have capitalized on the goodwill and efforts of Soler, to usurp the market Soler had carefully cultivated, and shortly thereafter Mitsubishi instituted the within action, in which Mitsubishi seeks, among other things, to

withhold from Soler the protection of the laws of the Commonwealth of Puerto Rico.

33. It should be further noted that at the present time Mitsubishi has failed to take any action whatsoever with respect to claims in excess of $120,000 for warranty reimbursements submitted by Soler. See Exhibit "Q" annexed hereto which is a summary of records prepared in the ordinary course of business of Soler which document each and every such claim. This is in addition to the claim of $18,914.19 acknowledged in Mitsubishi's letter of June 24, 1982 which is annexed hereto as Exhibit "R". It is incredible that Mitsubishi can claim there are no issues of fact remaining with respect to these claims.

34. In conclusion, there are a number of issues of fact which go to the very heart of the Soler counterclaims which are unresolved. There has been no discovery to date. The motion by Mitsubishi should be denied in its entirety.

WHEREFORE, it is respectfully requested that the motion by Mitsubishi to dismiss and for summary judgment be denied in its entirety, together with the costs and disbursements of this motion and, such other and further relief as this Court deems just and proper.

/s/ JOAQUIN SOLER
Joaquin Soler

[Subscribed and sworn to
September 21, 1982]

[Jurat omitted in printing]

Exhibit L to Soler Affidavit

(TABLE 4)

Estimate for Local Inventory of Japanese Cars as of Sept. '81.

(A): Maritime Register

(B): Registration by Polk

(C): Balance = (A)—(B)

Jan — Dec 1980

	(A)	(B)	(C-1)
MMC	17907	12650	5257
TOYOTA	21893	15799	6094
NISSAN	17172	13174	3998
MAZDA	4828	3177	1651
HONDA	5345	4492	853

Jan — Sept 1981

	(A)	(B)	(C-1)
MMC	9115	10506	—1391
TOYOTA	14489	15040	—551
NISSAN	11080	11026	54
MAZDA	3329	3637	—308
HONDA	6900	3506	3394

Balance as of Sept. 1981

	(D)	(E)	(F)
MMC	3866	0	3866
TOYOTA	5543	1000	4543
NISSAN	4052	2000	2052
MAZDA	1343	N/A	1343
HONDA	4247	3000	1247

(D): (C-1)—(C-2)

(E): Estimated Diversion

(F): Estimated field stock as of end Sept '81

Declaration of Mitsuaki Mitsukuri

IN THE UNITED STATES DISTRICT COURT

For The District of Puerto Rico

[Caption omitted in printing]

Mitsuaki Mitsukuri declares the following to be true pursuant to the provisions of 28 U.S.C. § 1746:

1. At all times relevant herein, I was the General Manager of the Latin America Group of Plaintiff and Defendant on Counterclaim Mitsubishi Motors Corporation ("MMC"). As such, I was in charge of the sale of MMC products in Puerto Rico. I make this reply affidavit on personal knowledge in further support of MMC's motion for an order granting summary judgment on the counterclaims of Defendant and Plaintiff on Counterclaim Soler Chrysler-Plymouth, Inc. ("SCP").

Introduction

2. In my prior affidavit in support of MMC's motion for summary judgment, sworn to July 9, 1982, I set forth the facts relevant to MMC's motion with respect to each of SCP's counterclaims. This declaration is addressed to the three factual issues that SCP has not effectively abandoned. SCP asserts (a) that MMC forced it to order unwanted vehicles, (b) MMC had no legitimate business reason for refusing to allow the transshipment of vehicles produced for SCP for resale in Puerto Rico, and (c) that MMC wrongfully attempted to appropriate SCP's business. As set forth below, all three of those claims are false.

A. MMC did not force SCP to order unwanted vehicles.

3. SCP has abandoned its previous claim that MMC unjustifiably refused to ship it vehicles. SCP now asserts that MMC forced it to accept unwanted vehicles. That claim revolves about SCP's assertions that its minimum sales volume ("MSV") for 1980 and 1981 were unreasonably high. Those assertions are false.

1. *SCP's 1980 MSV was reasonable.*

4. As is customary in the automobile business, the Sales Procedure Agreement, dated October 31, 1979, between SCP and MMC (a copy of which is annexed as Exhibit B to my prior affidavit) provided that for each model year the parties would mutually agree on a MSV. That MSV would establish a target figure for sales of MMC vehicles in SCP's territory.

5. Because SCP was a new entrant in the market for MMC vehicles in Puerto Rico for the 1980 model year, its MSV for that year was set at the very conservative level of 1,992 units. A copy of SCP's 1980 MSV agreement is annexed as Exhibit L to my prior affidavit.

6. SCP now suggests that this MSV of 1,992 units was unreasonable because it represented nearly a 100% increase over the volume of vehicles ordered by its predecessor, Atlantic Performance Cars Corp. ("APC").

7. The reasonableness of SCP's 1980 MSV is indisputable. First, SCP admits that it substantially exceeded its MSV for 1980. SCP's claim that its 1980 MSV was somehow evidence of bad faith on MMC's part is untenable on its face.

8. Second, APC was inactive in the sale of MMC vehicles during 1979. In fact, prior to the middle of 1979, APC had decided to sell its business and was phasing out its operations. Its volume of orders was therefore at a very low level. SCP's attempt to construct an argument by comparing its 1980 MSV to APC's orders for 1979 model year vehicles is totally misleading.

2. *SCP's 1981 MSV was reasonable.*

9. On or about June 24, 1980, SCP and MMC agreed on an MSV of 4,750 MMC vehicles for the 1981 model year. A copy of SCP's 1981 MSV agreement is annexed as Exhibit M to my prior affidavit.

10. In or about May 1980, MMC had proposed an MSV of 4,500 vehicles for the 1981 model year. Nowhere does SCP allege that it protested this figure, and in fact it never did so.

11. In my previous affidavit, I explained how SCP had requested an increase of 500 units in its MSV. In response, SCP now claims that it "requested that 500 four-door vehicles be *substituted* for 500 two-door vehicles (NE-24)," and that MMC thereupon unilaterally increased the 1981 MSV to 5000 units. That assertion is false. Moreover, SCP nowhere alleges that it protested that second figure, and no such protest was ever made. Moreover, it is significant that SCP claims that, in response to the proposed MSV of 4500 units, it sought only a change in the "model mix" for that year.

12. Subsequently, after a customs problem developed with the SP-27 pickup truck, MMC and SCP agreed to remove all 250 SP-27 units from the 1981 MSV, resulting in a final MSV of 4,750 units. It is noteworthy that SCP admits that this reduction was the subject of mutual agreement, negating any claim that the 1981 MSV was "imposed" upon SCP.

13. At the time the parties agreed upon the 1981 MSV, the market for MMC vehicles in Puerto Rico was very strong. Demand exceeded supply and MMC was forced to ration its vehicles among its distributors. For example, by telex dated February 20, 1980, a copy of which is annexed hereto as Exhibit A, SCP requested MMC to *add* 500 vehicles to its April production order. Contrary to SCP's current claims that vehicles were forced upon it, MMC declined that request by telex dated February 21, 1980, a copy of which is annexed hereto as Exhibit B.

14. SCP itself believed at or about the time it agreed to its MSV that it could sell between seven and eight thousand 1981 MMC vehicles, or 2,250 to 3,250 more vehicles than its MSV. In an application to increase its line of credit for the purchase of vehicles to $10.6 million, SCP stated to the Bank of America, by letter dated July 1, 1980, one week after it agreed to its MSV:

> "I am enclosing for you a copy of the sales projections of Mitsubishi vehicles; *we think we could sell between 7 and 8 thousand* for a gross profit that will vary between 3.5 and 4.5 million." (emphasis added; translation supplied)

A copy and official translation of that letter are annexed hereto as Exhibit C.

15. Moreover, the timing of SCP's orders is fatal to its claims respecting its MSV. My prior affidavit explained (a) that before the execution of the 1981 MSV, SCP had already ordered 1851 units of 1981 MMC vehicles, 39% of its MSV, and (b) that fifteen days later, SCP ordered an additional 1000 vehicles. I submit that such extremely

large orders are wholly inconsistent with SCP's current claims that MMC was "forcing" vehicles on it.

16. After the parties agreed to SCP's 1981 MSV, MMC, concerned by SCP's very large orders and resulting high inventory, offered to postpone or cancel the shipment of certain vehicles. For example, by telex dated August 12, 1980, a copy of which is annexed hereto as Exhibit D, I advised SCP:

> "In consideration of the slowering sales, we are planning to postpone the production of your August ordered vehicles to keep you out of the expectable burden of the heavy inventory accumulation."

17. By telex dated August 18, 1980, a copy of which is annexed hereto as Exhibit E, I advised SCP that it could review its "sales forecast and come to us with a request for cancellation" of its October order.

18. In the face of MMC's offers to postpone or cancel production, SCP continued to order more vehicles. In fact, by telex dated September 12, 1980, a copy of which is annexed hereto as Exhibit F, SCP again requested MMC to *add* vehicles to its November order.

19. SCP continued to adhere to that rosy view of its own future. By telex dated September 17, 1980, a copy of which is annexed hereto as Exhibit G, SCP stated:

> "Excess of vehicles in stock have affected our projections but we expect total sales this month which will once again place us in good position to take care in due time of all our commitments."

20. As set forth in detail in my previous affidavit, SCP continued to order vehicles throughout 1980 and well into 1981 at a rate far beyond its capacity to sell them. When

SCP's inventory and backlog of orders reached unmanageable proportions, MMC, at substantial expense, cancelled and postponed orders, stored vehicles in Japan, and accepted less advantageous financing.

21. SCP's current allegations respecting unwanted vehicles notwithstanding, it continued at times to request shipment of vehicles. In fact, on December 16, 1981, at a time when SCP now contends MMC sought to force it to accept unwanted cars, it sent MMC a telex (Exhibit J to my previous affidavit), stating:

> "Please advise when you expect to ship 204 units as letter of credit will expire and it will be difficult to obtain letter of credit for 1981 units this late in the year. We have heard the units are no longer available. Please advise if so, as if they have been sold by [MMC], we would be in a good position to order 1982 models immediately as our inventory of 1981 units will be exhausted soon.
>
> "If units available, advise if by opening additional letter of credit for the 262 units you will be able to ship without additional shipping charges otherwise, maybe you can ship to us 34 additional 1982 units to complete 500. We must have 1982 units soon and would like to have up to date status of our units still in Japan, and if they are available to make necessary financial arrangements."

22. As set forth in my previous affidavit, on that date SCP had no operative letter of credit and was unable to obtain financing. It is striking that, in direct contradiction to its present claims, SCP was attempting to conceal its financial plight from MMC and obtain 500 additional vehicles.

23. I submit that SCP has only itself to blame for the consequences of its poor business judgment. The record

shows that until SCP voluntarily abandoned its business, MMC had gone far beyond its contractual obligations in an attempt to assist SCP in salvaging its business. In response to these efforts, SCP sent a telex on May 29, 1981, stating:

> "I want to thank you very much for your assistance on our problem as sales and overstock position. . . . Once again thank you and best personal regards."

This contemporaneous document (Exhibit H hereto) flatly contradicts SCP's current litigation-oriented assertions. I respectfully submit that SCP's claims founded upon its MSV should be dismissed.

B. MMC's CONDUCT WITH RESPECT TO THE PROPOSED TRANSSHIPMENT OF VEHICLES WAS PROPER AND LEGAL

24. SCP asserts that MMC's refusal to consent to the transshipment of vehicles by SCP was unfounded and improper. That assertion is false.

25. As set forth in my prior affidavit, MMC is a small competitor in the United States market. SCP has not even adverted to the fact that MMC has only a 2% share of the United States automobile market, and that there is vigorous interbrand competition in that market. MMC clearly lacks the power to raise the price of its vehicles without losing a significant number of customers. On the other hand, MMC, which is just entering the mainland market under its own name, has a special need to protect its goodwill.

1. *Chrysler acted as MMC's distributor.*

26. Prior to 1969, Mitsubishi Heavy Industries, Ltd. ("MHI") was engaged in manufacturing automobiles, but

had no distribution network for its vehicles in the United States. In or about that year, MMC (of which 85% is owned by MHI and 15% by Chrysler Corporation ("Chrysler") was formed. At about the same time, MMC entered into a contract appointing Chrysler as the exclusive distributor of MMC-built vehicles in the United States (the "United States Distribution Agreement"). MMC entered into that agreement in order to gain immediate access to the extensive Chrysler dealer network. As a result, Chrysler-Plymouth and Dodge dealers throughout the United States began selling certain vehicles manufactured by MMC, while continuing to sell Chrysler-manufactured vehicles (similar to SCP) and continue to do so. I submit that the United States Distribution Agreement, which made a new manufacturer's vehicles available to the public without removing any of its competitors', was manifestly pro-competitive.

27. On or about September 24, 1981, MMC and Chrysler entered into an amendment to the United States Distribution Agreement whereby Chrysler surrendered its exclusive distribution rights. Despite SCP's assertions that the MMC-Chrysler relationship constitutes a *per se* violation of the Sherman Act, on or about November 18, 1981, the United States Department of Justice issued a "business review" letter to the parties, stating that it did not intend to take any antitrust action against them arising out of the contract. A copy of that business review letter is annexed hereto as Exhibit I.

2. *MMC's refusal to consent to transshipment was reasonably calculated to promote its interests.*

28. In addition to the fact that SCP's proposed transaction would have infringed Chrysler's distribution rights under the United States Distribution Agreement, MMC

had a number of independent business reasons for its unilateral decision not to consent to transshipment. Those reasons are set forth below.

29. I understand that in nearly all states, dealers or distributors of motor vehicles are required by law to be licensed as such. MMC has never been informed that SCP was licensed as an automobile distributor other than in Puerto Rico.

30. It is uncontradicted that the vehicles MMC manufactured pursuant to SCP's orders were built for resale in Puerto Rico and were accordingly not equipped with heaters and defoggers. Pursuant to 49 C.F.R. § 571.103, those vehicles could not have been sold in the mainland United States without modification.

31. By the time SCP began its attempts to transship its vehicles, they had already been manufactured and were held in inventory either in Japan or in Puerto Rico. SCP suggests either (a) that MMC, at its own expense, should have installed heaters in those vehicles, which it was under no contractual obligation to do, or (b) that SCP could have installed the heaters itself. The only support offered for that latter alternative is Mr. Soler's assertion that the "warranty services provided by [SCP] included work much more difficult than *what appeared to be* the simple installation of heaters and defoggers." SCP does not allege that it has ever installed a heater or a defogger.

32. After MMC had expressed its concerns respecting the installation of heaters, SCP never even responded, let alone proposed a practical plan.

33. As set forth in my prior affidavit, SCP surreptitiously attempted to sell its inventory of MMC vehicles elsewhere in Latin America. As MMC informed SCP as soon as it

learned of those previously undisclosed plans, the vehicles ordered by SCP would not operate on the leaded gasoline available in Latin America. However, it is clear from SCP's irresponsible conduct in attempting such a sale that it was indifferent to the preservation of MMC's goodwill.

34. MMC was informed by Chrysler that any cars transshipped by SCP would not have had access to warranty service facilities, a fact not disputed by SCP. MMC had been informed that Chrysler dealers were only obligated to provide warranty service to vehicles purchased outside of their territories if they had been sold in a *bona fide* retail sale. MMC had been further informed that Chrysler dealers would probably refuse voluntarily to assume that warranty obligation, leaving any transshipped cars without adequate service. SCP's attempt to shift its obligation to service the cars it wished to sell to other Chrysler dealers was a further reason why MMC refused to consent to the transaction.[1]

35. MMC's moving papers demonstrated that allowing SCP's proposed transshipment to the mainland would have harmed MMC under the program by which the Japanese government has imposed restrictions on the export of automobiles to the United States. As shown in SCP's own papers, Chrysler had expressed the same concern. SCP's current suggestion that MMC was required to risk an administrative penalty before taking cognizance of this factor is without legal or business sense. To the contrary, preservation of MMC's good relationship with the Japanese trade authorities was a further valid basis for MMC's unilateral decision.

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[1] Moreover, certain of the models sold by SCP, such as the four door version of the Plymouth Champ, were not then sold at all on the mainland until the very end of 1981.

C. MMC DID NOT CONSPIRE TO APPROPRIATE THE BUSINESS OF SCP.

36. Despite SCP's claim that MMC intended to appropriate its business (allegedly after destroying it) it is unquestioned that, at the time SCP filed its counterclaim, MMC was not acting as the distributor of its vehicles in Puerto Rico, and did not do so until, as set forth below, MMC purchased island-wide distribution rights from the two CISA distributors who had continued to deal with MMC.

37. In its most recent "informative motion," SCP has presented to the Court a copy of the contract whereby, among other things, one of the two former CISA distributors of MMC products in Puerto Rico transferred its distribution rights to MMC. The second such distributor entered into a virtually identical contract at or about the same time. SCP asserts that those contracts are somehow proof of MMC's improper conduct.

38. To the extent that those contracts are relevant to this action, they further demonstrate MMC's good faith. After protracted negotiations, CISA's former distributors of MMC products sold and assigned their distribution rights to MMC. In connection with that transaction, MMC transferred $1.5 million to each distributor. Simultaneously, MMC granted both former CISA distributors franchises for the retail sale of MMC vehicles. Such careful, arms-length dealings conclusively establish MMC's good faith in its dealings with its distributors in Puerto Rico, and are entirely consistent with its record of assistance to all three of its former distributors.

Conclusion

39. I submit that SCP has failed to raise a genuine issue of material fact in opposition to MMC's motion. For the reasons set forth above, as well as in MMC's other papers, I respectfully request that MMC's motion be granted in its entirety.

I, MITSUAKI MITSUKURI, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Tokyo, Japan on November 4, 1982.

/s/ [Illegible]
Mitsuaki Mitsukuri

Exhibit I to Mitsukuri Declaration

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

Washington, D.C. 20530
November 18, 1981

John W. Reboul, Esquire
Reboul, MacMurray, Hewitt
Maynard & Kristol
45 Rockfeller Plaza
New York, NY 10111

Dear Mr. Reboul:

This is in response to your letter of September 29, 1981 requesting a statement pursuant to the Business Review Procedure (§ 28 C.F.R. 550.6) of the present enforcement intentions of the Department of Justice under the antitrust laws with respect to the recently executed agreements, dated September 24, 1981, between Chrysler Corporation and Mitsubishi Motors Corporation, which collectively establish arrangements for the distribution of Mitsubishi motor vehicles and related products in the United States.

As we understand it, the new agreement would supplant a 1970 agreement between the parties which gave Chrysler the exclusive distribution rights for Mitsubishi motor vehicles in the United States. Under the new agreement, Mitsubishi would distribute automobiles and light trucks in the United States through both Chrysler and its own U.S. subsidiary, MMSA, Inc. This non-exclusive distribution scheme would still permit Chrysler to obtain, at least through 1984, the exclusive distribution rights to certain models of Mitsubishi motor vehicles. MMSA, during the same period, would enjoy exclusive rights in certain other models. After

that time, the parties would be free to negotiate whether specific models would be sold exclusively through the Chrysler distribution network or whether distribution for all models of Mitsubishi motor vehicles to be distributed in the U.S. under the agreement would be shared by Chrysler and MMSA. In addition, Chrysler would be given certain guarantees as to both volume allocations and acquisition price. The amended distribution agreement is scheduled to expire in 1990, but can be extended by four year terms upon the approval of both Chrysler and MMSA.

Based upon the information you have provided, the Department has no present intention to institute an enforcement action to enjoin implementation of the amended distribution agreement. The Department must remain free, however, to re-examine this arrangement in the future and to take whatever action is appropriate if it is shown to be having anticompetitive effects.

This statement of the Department's enforcement intention is made in accordance with the Department's business review procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this response will be made public simultaneously with this notification to you. Unless you make an appropriate request that all or part of the supporting materials be withheld in accordance with 28 C.F.R. § 50.6(10)(c), such information will become publicly available within thirty days of the date of this letter.

Sincerely yours,

/s/ WILLIAM F. BAXTER
William F. Baxter
Assistant Attorney General
Antitrust Division

[Enclosure omitted in printing]

COMMERCIAL ARBITRATION RULES

AS AMENDED AND IN EFFECT
FEBRUARY 1, 1971

THE JAPAN COMMERCIAL
ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION RULES

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CHAPTER I—GENERAL PROVISIONS

Purpose

RULE 1—The purpose of these Rules shall be to provide such matters as are necessary for the arbitration of commercial disputes by the Japan Commercial Arbitration Association (hereinafter called "Association").

Agreement on Arbitration

RULE 2—When the parties have agreed, by a written consent to submission or other written contract, to submit to arbitration by the Association or under these Rules, the provisions of these Rules shall, in accordance with what they have agreed, be deemed to be the provisions of arbitration agreed upon between the parties.

Arbitration Tribunal

RULE 3—Arbitration under these Rules shall be carried out at an Arbitration Tribunal (hereinafter called "Tribunal") consisting of the arbitrator(s) appointed by the parties, by the arbitrators previously appointed or by the Association.

2. The Tribunal shall be seated at the headquarters or at a branch office of the Association.

3. When in the course of arbitration under these Rules there should be a question concerning the interpretation of these Rules, the Tribunal shall be bound by the interpretation of the Association in respect thereof.

Secretariat and Tribunal Clerk

RULE 4—Clerical affairs concerning arbitration under these Rules, except those provided in the next Paragraph, shall be conducted by the Secretariat of the Association

(including the Secretariats of the branch offices; hereinafter called "Secretariat").

2. Clerical affairs of the Tribunal shall be conducted by an official appointed by the President of the Association or the Director of the branch office concerned hereinafter called "Tribunal Clerk").

Panel of Arbitrators

RULE 5—The Association shall compile a panel of arbitrators for the convenience of the parties in the selection of an arbitrator(s) pursuant to the provisions of these Rules, and shall at all times have such panel available for use at each Secretariat.

Representation

RULE 6—A party may be represented by a lawyer or such other person as shall be recognized to be justified in taking procedure under these Rules.

CHAPTER II—REQUEST FOR ARBITRATION

Request

RULE 7—A person requesting arbitration under these Rules (hereinafter called "Claimant") shall submit the following documents to any one of the Secretariats, together with the fee provided in the Annexed Schedule of Fees:

(1) A written request for arbitration;

(2) The original or a copy of the document evidencing the agreement between the parties relative to arbitration under these Rules;

(3) The original or a copy of any documentary evidence supporting the claim in the request for arbitration;

(4) In case where the request is made by an agent, a power of attorney.

2. The following matters shall be stated in the written request for arbitration mentioned in Item (1) of the preceding Paragraph:

(1) The full personal or corporate names of the parties and their addresses;

(2) In case where the Claimant is represented by an agent, the name and address of the agent;

(3) Purport of the request for arbitration;

(4) Reason for the request and the method of proof.

Acceptance and Notification of Request for Arbitration

RULE 8—The Secretariat shall, when there has been submitted a request for arbitration, confirm whether such request is in conformity with the provisions of the preceding Rule and, upon confirmation of its conformity, accept it.

2. The Secretariat shall, upon acceptance of a request for arbitration, notify the parties to such effect. In this case, a copy of the request for arbitration shall be attached to the notice to the party against whom the request for arbitration is submitted (hereinafter called "Respondent").

Answer to Request

RULE 9—The Respondent may, within thirty (30) days from the date of the mailing of the notice to be given in accordance with the provisions of Paragraph 2 of the preceding Rule (hereinafter referred to as "Basic Date"), make answer by submitting the following documents to the Secretariat giving such notice:

(1) A written answer;

(2) The original or a copy of any documentary evidence supporting the reason stated in the answer;

(3) In case where the answer is made by an agent, a power of attorney.

2. The following matters shall be stated in the written answer mentioned in Item (1) of the preceding Paragraph:

(1) The full personal or corporate names of the parties and their addresses;

(2) In case where the Respondent is represented by an agent, the name and address of the agent;

(3) Purport of the answer;

(4) Reason for the answer and the method of proof.

3. The Secretariat shall, when there has been submitted an answer in accordance with the provisions of Paragraph 1, confirm whether such answer is in conformity with the provisions of the preceding two Paragraphs, and upon confirmation of its conformity, accept it. Provided that, when it is found that the purport of or the reason for the answer obviously contains a counterclaim, the Secretariat may refuse to accept such answer, requesting the Respondent to submit, in accordance with the provisions of the next following Rule, a counterclaim in respect of the part concerned.

4. The Secretariat shall, upon acceptance of an answer, notify the parties to such effect. In this case, a copy of the written answer shall be attached to the notice to the Claimant.

Counterclaim

RULE 10—The Respondent may, after the Basic Date but before the elapse of thirty (30) days from the day of the establishment of the Tribunal, submit a counterclaim.

2. The Respondent's counterclaim shall be handled jointly with the Claimant's request for arbitration.

3. The provisions of the preceding three Rules shall apply mutatis mutandis to a counterclaim, to the acceptance and notification of a counterclaim and to the answer to a counterclaim.

RULE 11—When it is found, after a Tribunal has been established, that the purport of or the reason for the answer of the Respondent contains a counterclaim, the Tribunal shall, by its decision, request that a counterclaim in respect of the part concerned be submitted in accordance with the provisions of the preceding Rule.

Change of Request of Counterclaim

RULE 12—A party which has requested arbitration or has made a counterclaim may make a change of request or counterclaim (hereinafter called "change"). Provided that, after the Tribunal has been established, such change shall be made only with the approval of the Tribunal.

2. The provisions of Rule 9 shall apply mutatis mutandis to the answer to a change. Provided that the period of time for submitting the answer shall be reckoned as twenty-five (25) days from the day on which the Secretariat or Tribunal Clerk issues a notice of the change to the other party.

Number of Copies of Documents to be Submitted

RULE 13—The number of copies of the documents to be submitted in accordance with the provisions of Rule 7, Paragraph 1 and Rule 9, Paragraph 1 (inclusive of the case where these provisions apply mutatis mutandis in Rule 10, Paragraph 3 and in Paragraph 2 of the preceding Rule) shall, except in case where such document is a power of attorney, be three (3) including the original when the original is submitted. Provided that, when two or more arbitrators have been appointed or are found likely to be appointed, the number of copies shall be three (3) plus the number obtained by subtracting one from the number of such arbitrators.

Place of Arbitration

RULE 14—The parties shall, within fifteen (15) days from the Basic Date, agree on the headquarters or a branch office of the Association as the place of arbitration, and shall give notice in writing to this effect to the Secretariat from which they received the notice of acceptance of the request for arbitration.

2. In case where the parties fail to give notice of the place of arbitration to the Secretariat within the period mentioned in the preceding Paragraph, the Association shall decide the place of arbitration.

CHAPTER III—APPOINTMENT OF ARBITRATOR

Qualification

RULE 15—No person having a beneficial interest in the case under arbitration shall be an arbitrator.

2. No person not actually residing in Japan at the time of appointment shall, except in case where the parties have agreed otherwise, be an arbitrator.

Agreement of Parties

RULE 16—The parties may, by agreement in writing, appoint one or more arbitrators or fix the number and the method of selection of the arbitrators (inclusive of the period of time for selection; hereinafter the same).

Number

RULE 17—In case where the parties cannot agree on the number of arbitrators within fifteen (15) days from the Basic Date, the number of arbitrators shall be one (1).

2. In the case of the preceding Paragraph, when one of the parties requests the number of arbitrators to be made three (3) and the Association, in consideration of the nature of the case, finds this request to be appropriate, the number of arbitrators shall be three (3).

Method of Appointment

RULE 18—In case where parties are to appoint a single arbitrator, if they fail to make such appointment within thirty (30) days from the Basic Date, the Association shall appoint a single arbitrator, taking into consideration the intention of the parties.

RULE 19—In case where the parties have agreed only that the number of arbitrators shall be two or a definite number greater than two but not on the method of selection of the arbitrators, each party shall, within the number agreed upon, appoint the same number of arbitrators, and when the number agreed upon is an odd number the ap-

pointed arbitrator shall appoint one (1) more arbitrator at an early date.

2. In case where the parties are to appoint two or more arbitrators when they have not completed such appointment within thirty (30) days from the Basic Date, the Association shall appoint the arbitrator(s) yet to be appointed, taking into consideration the intention of the party concerned.

Restriction on Appointment

RULE 20—As regards an arbitrator to be appointed by the Association or the arbitrators in accordance with the provisions of Rule 18 or of Paragraph 1 of the preceding Rule, when either party requests that a person of a different nationality from those of both parties be appointed as the arbitrator, the Association or the arbitrators shall comply with such request. Provided that such request shall be made in writing to be submitted to the Secretariat within thirty-five (35) days from the Basic Date.

Notice of Appointment

RULE 21—When a party has appointed an arbitrator, he shall, within thirty (30) days from the Basic Date, submit to the Secretariat a document stating the name, address and occupation of the arbitrator together with his written acceptance of appointment.

2. When an arbitrator has been appointed, the Secretariat shall, without delay, notify the parties and arbitrators in writing of his name, address and occupation.

Measures in case of Vacancy

RULE 22—When there is a vacancy in the office of an arbitrator because of death, resignation or other reason, the person(s) who appointed the arbitrator concerned shall, by the same method of appointment as for the arbitrator concerned, appoint an arbitrator to take his place.

CHAPTER IV—ARBITRATION PROCEEDINGS

SECTION 1—PROCEEDINGS OF HEARING

Order of Hearing, Etc.

RULE 23—The Tribunal shall determine the order, time and place of each hearing.

2. In determining the order of a hearing in accordance with the provisions of the preceding Paragraph, the Tribunal shall give sufficient consideration to preventing the delay of the proceedings.

Hearing

RULE 24—The hearing shall be conducted in the presence of the parties. Provided that this shall not apply in case where a party, in spite of having duly received notice of the time, etc. of the hearing, is absent without just reason.

Postponement

RULE 25—When the parties have stated their agreement to postpone the date of a hearing by means of a written request the Tribunal shall postpone such date.

2. When, having received a request for postponement of the date of a hearing from one of the parties, the Tribunal finds that postponement is unavoidable, it shall postpone the date of the hearing concerned.

Evidence

RULE 26—A party may submit evidence in support of his own contention or file a petition for the voluntary appearance of a witness or an expert witness. Provided that as regards evidence, the Tribunal may refuse to accept the evidence when it is found that no relevancy exists between

the evidence submitted and the contention of the party concerned.

2. The Tribunal may, when it deems necessary, request the submission of evidence or the voluntary appearance of a witness or an expert witness.

3. The Tribunal shall not accept evidence except in the presence of the parties. Provided that this shall not apply in respect of a party who is absent in default.

4. The Tribunal shall not request a witness or an expert witness to take oath.

Inspection and Investigation

RULE 27—The Tribunal may, when it deems necessary or when there has been a petition from a party, make inspection or investigation in the presence of the parties.

Minutes

RULE 28—The Tribunal Clerk shall for each hearing take and keep minutes stating the time, the place and the names of those attending as well as a summary record of the hearing.

2. The Tribunal Clerk shall take a stenographic record in case where the Tribunal has so ordered or there has been a petition from a party.

Interpretation or Translation

RULE 29—The Tribunal Clerk shall arrange for interpretation or translation in case where the Tribunal has so ordered or there has been a petition from a party.

Closed Proceedings

RULE 30—The proceedings of the hearing shall be closed to the public.

Attendance at Hearing

RULE 31—A person having a direct beneficial interest in the case under arbitration may attend the hearing. The Tribunal shall decide whether the attendance of any other person is to be allowed.

Conclusion and Reopening of Proceedings of Hearing

RULE 32—The Tribunal shall, when it finds that all contentions and evidence of the parties have been put forth, conclude the proceedings of the hearing.

2. The Tribunal may, by its decision, reopen the proceedings of the hearing.

Arbitration Without Hearing

RULE 33—The parties may, by means of a written request stating their agreement, request arbitration without a hearing. In this case, the arbitration proceedings shall, except in case where the provisions of the other Rules of these Rules can be applied mutatis mutandis, be determined by the Tribunal.

Decision of Tribunal

RULE 34—In case where there are two or more arbitrators, decisions of the Tribunal, inclusive of the decision on award, shall be resolved by a majority of the votes of the arbitrators. Provided that, in the case of equal voting, if the arbitrators have chosen one among them as the chief arbitrator, the chief arbitrator shall cast the deciding vote.

SECTION 2—AWARD

Period

RULE 35—The Tribunal shall make an award within thirty-five (35) days (in the case prescribed in Rule 37, Paragraph 2, within forty-five (45) days) from the day on which the proceedings of the hearing were concluded.

Award

RULE 36—The award shall state at least the following matters and bear the signature and seal of each arbitrator: Provided that this shall not apply to Item (4) (Reason for award) in case where the parties have agreed to the effect that no statement is necessary and in the case prescribed in the next following Paragraph.

(1) The full personal or corporate names of the parties and their addresses;

(2) In case where a party is represented by an agent, the name and address of the agent;

(3) Text of award;

(4) Reason for award;

(5) Date of award.

2. The Tribunal may, when in the course of the arbitration proceedings the parties have reached a settlement by reconciliation, set forth the content of the settlement by reconciliation as the award.

3. The Tribunal shall, in the case of the preceding two Paragraphs, render a judgment relative to the sharing of the arbitration fees and expenses. The Tribunal may, when it deems necessary, also decide the manner of payment of the arbitration fees, expenses and remuneration for the arbitrators.

Language

RULE 37—The award shall be written in the Japanese language.

2. In case where there has been a request submitted by one of the parties, the award shall, notwithstanding the provisions of the preceding Paragraph, be written in the Japanese language and the English language and both versions shall be authentic. The same shall also apply in case where there is among the arbitrators a person of a nationality other than Japanese nationality.

3. In the case prescribed in the preceding Paragraph, when a discrepancy in interpretation has arisen between the two versions, the interpretation of the Japanese language version shall prevail.

Service

RULE 38—The authentic versions of the award shall be served on the parties by one of the following methods:

(1) Delivery-certified registered mail;

(2) Hand delivery to the party;

(3) In case where the method is otherwise provided in law, such method.

2. Service under the provisions of the preceding Paragraph shall be conducted after all fees, expenses and remuneration for the arbitrators have been paid in full.

CHAPTER V—SUPPLEMENTARY RULES

Attachment of Translation

RULE 39—A party shall, when a document, evidence or other written material submitted to the Secretariat or

Tribunal is in a foreign language, attach a Japanese language translation thereto. Provided that this shall not apply in case where the Secretariat or Tribunal finds it unnecessary.

Extension of Period

RULE 40—The parties may, by agreement in writing, extend a period of time prescribed by these Rules.

2. The Association or Tribunal may, when it deems necessary, extend a period of time prescribed by these Rules.

3. The Association or Tribunal shall, when it has extended a period of time in accordance with the provisions of the proceeding Paragraph, notify the parties and arbitrators without delay.

Notification, Etc.

RULE 41—The Tribunal Clerk shall notify the parties of any decision of the Tribunal made in the course of the arbitration proceedings unless the decision was made in the presence of the parties.

2. In the case of notifying or serving a document on a party, the Association or Tribunal Clerk shall, unless otherwise provided by these Rules, hand or mail the document concerned to the party.

Fees

RULE 42—In case where arbitration is conducted under these Rules, the fees to be borne by the parties shall be the request fee, arbitration fees and hearing postponement fee mentioned in the Annexed Schedule of Fees.

2. The arbitration fees shall be borne by the parties in accordance with the sharing of fees fixed in the award.

3. The hearing postponement fee shall, in the case mentioned in Rule 25, be paid for each postponement by the party requesting the postponement.

4. The request fee shall in no case be refunded.

Expenses

RULE 43—Expense required for a witness or an expert witness, expense required for inspection or investigation, expense required for taking a stenographic record or expense required for interpretation or translation shall, in case where such expense has resulted from a petition or a request by a party, be borne by such party.

2. In case where the expense mentioned in the preceding Paragraph has resulted from an order by the Tribunal, such expense shall, unless otherwise agreed upon by the parties, be borne in accordance with the sharing of expenses fixed in the award. Provided that the Tribunal may, in view of the circumstances, decide how the burden of such expense shall be shared.

Remuneration for Arbitrators

RULE 44—The parties shall equally bear the burden of the remuneration for the arbitrators fixed by the Association.

Payment of Fees, Etc.

RULE 45—The Tribunal, when it deems necessary, may, by its decision, demand of a party the payment in advance to the Association of a part of the arbitration fees, expenses and remuneration for the arbitrators.

RULE 46—The parties shall pay the fees, expenses and remuneration for the arbitrators to the Secretariat upon demand of the Secretariat or Tribunal Clerk.

Violation of Decision

RULE 47—The Tribunal may, when a party fails to abide by a decision of the Tribunal, take necessary measures in respect of such party.

Authentic Version of These Rules

RULE 48—These Rules are prepared in the Japanese language and in the English language and both versions are authentic. Provided that, when a discrepancy in interpretation has arisen between the two versions, the interpretation of the Japanese language version shall prevail.

SUPPLEMENTARY PROVISIONS

1. These Rules shall be enforced on and from February 1, 1971.

2. The Rules, as amended in June, 1963 (hereinafter referred to as the "Former Rules") are repealed.

3. An arbitration the proceedings of which are being conducted, at the time of enforcement of these Rules, either through oral hearing or without oral hearing in accordance with the Former Rules, shall be governed by the Former Rules.

ANNEXED SCHEDULE OF FEES

1. Request Fee, Arbitration Fees and Hearing Postponement Fee shall be as follows:

   [Schedule of Fees omitted in printing]

2. The refund of Administrative Fee shall be made as follows:

   (1) When the person submitting a request or a counterclaim has, prior to the appointment of an arbitrator, notified the Association in writing of his withdrawal of the request for arbitration, the administrative fee shall be refunded.

   (2) In case where there are to be two or more arbitrators, when, after one or more arbitrators have been appointed, the parties have, by a document evidencing their agreement notified the Association of their withdrawal of the request for arbitration, two thirds of the administrative fee shall be refunded.

   (3) When, after the Tribunal has been established, but not later than forty-eight (48) hours before the time of the first hearing, the parties have, by a document evidencing their agreement, notified the Association of their withdrawal of the request for arbitration, one half of the administrative fee shall be refunded. Provided that in the case prescribed by Rule 33 (Arbitration without Hearing), what has been fixed by the Tribunal shall govern.

THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION

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AMICUS CURIAE

BRIEF

MOTION FILED
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Nos. 83-1569, 83-1733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,

v.

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE INTERNATIONAL CHAMBER OF COMMERCE AS AMICUS CURIAE

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MOTION OF THE INTERNATIONAL CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rules 36 and 42 of the Rules of this Court, the International Chamber of Commerce ("ICC") moves for permission to file the attached brief as amicus curiae. By letter filed with the Clerk of the Court, petitioner (and cross-respondent) Mitsubishi Motors Corporation consented to the filing of the brief. The consent of respondent (and cross-petitioner) Soler Chrysler-Plymouth, Inc. was requested but refused.

The Court of Arbitration of the ICC is one of the world's leading centers for international commercial arbitration. Accordingly, the ICC has an interest in the

principal question presented in this case, namely, whether the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires a federal court to compel the arbitration of U.S. antitrust claims asserted in connection with a dispute arising from an international contract.

The attached brief on behalf of the ICC discusses the crucial role of arbitration in international commerce and the suitability of arbitration for resolving international commercial disputes that include claims of anticompetitive conduct. The ICC believes that the parties to this particular proceeding will be unable to present these issues to the Court as adequately and comprehensively as an organization that currently receives requests to arbitrate 250-300 international disputes each year.

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BRIEF FOR THE INTERNATIONAL CHAMBER OF COMMERCE AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The International Chamber of Commerce ("ICC"), established in 1919 by American and European business leaders, is an international, non-governmental organization headquartered in Paris, France. At the end of 1983, the ICC was represented by national councils or committees in 58 countries, including the United States, and had members in an additional 48 countries. Its principal function is the promotion of international trade and investment based on free and fair competition.

One of the ways the ICC promotes world trade is by offering a variety of mechanisms for impartially and quickly resolving international commercial disputes. The oldest of these services is the ICC Court of Arbitration,

founded in 1923, which has become one of the world's leading centers for the settlement of commercial disputes between parties to international contracts.[1] The Court of Arbitration administers a set of rules for the conduct of arbitrations, assists the parties and the arbitrators, and supervises each case to ensure that the arbitration proceeds efficiently and produces an enforceable award. The ICC Court itself does not decide the cases it supervises; it is the arbitrators, chosen by the parties (with or without Court assistance), who decide the disputes.[2]

Over 5100 cases have been registered with the Court of Arbitration since its inception, and a record 291 requests for arbitration were registered in 1983. The Court and its administrative Secretariat are located in Paris, but ICC arbitrations may be conducted anywhere in the world. In 1983, they were held in 81 different countries, between parties from all over the globe. In over 30 percent of the cases, the amount in dispute ranged from $1 to $10 million, and in over 8 percent of the cases, the amount exceeded $10 million. The effectiveness of ICC arbitration is reflected by the estimate that more than 90 percent of the awards rendered in ICC arbitrations are carried out voluntarily and that less than one percent are set aside by a national authority.

The ICC has long been active in encouraging the use of arbitration to resolve transnational disputes. The ICC

[1] The ICC also administers the International Centre for Technical Expertise, which helps parties identify and resolve technical problems associated with fulfilling contractual undertakings. It maintains a Standing Committee for the Regulation of Contractual Relations, which assists parties in adapting contracts to unforeseen changes in economic and political conditions, and it administers Rules for Optional Conciliation, which provide for the appointment of committees to suggest terms of settlement for disputes.

[2] For a comprehensive discussion of the ICC Court of Arbitration and the nature of ICC arbitration proceedings, *see* W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (1984) (*"ICC Arbitration"*).

was instrumental in helping to negotiate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and one of the ICC's delegates to the Convention, G.W. Haight, wrote the leading summary of the conference proceedings.[3]

Arbitration is a favored method of settling international business disputes. By selecting the forum for dispute resolution, and often choosing the substantive law that will apply, parties to international contracts ensure the neutrality, certainty, and predictability that are essential to the continued growth of international trade. Without an arbitration clause, an international trader runs the risk of being forced to litigate in one or more of several jurisdictions, including the courts of the other party's home country. Arbitrations also are attractive because they are resolved more rapidly than most judicial litigation and because they provide the parties with greater assurance that trade secrets and other sensitive business information will remain confidential. The legitimate interest of parties in protecting their business secrets makes arbitration especially useful, particularly because some countries make all court papers public.

As a result, the ICC has a substantial interest in the Court's resolution of the principal question presented in this case, namely, whether the Convention requires a federal court to compel the arbitration of antitrust and other statutory claims arising in an international contractual dispute. The ICC seeks to have the Court adhere to its ruling in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), that arbitration is an appropriate method for resolving, with certainty and dispatch, all disputes arising out of an international commercial transaction, including claims based on U.S. statutory provisions. More-

[3] G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference May/June 1958* (1958). *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 530 n.10 (1974).

over, the ICC believes that the body of knowledge and experience it has accumulated during the course of administering international arbitrations for over sixty years will materially aid the Court in deciding this case.

STATEMENT OF THE CASE

This case arises from a dispute involving a Puerto Rican company, a Japanese company, and a Swiss subsidiary of a U.S. company. Soler Chrysler-Plymouth, Inc. ("Soler"), an automobile distributor, is the Puerto Rican corporation. Mitsubishi Motors Corp. ("Mitsubishi") is a Japanese corporation owned by Chrysler Corporation and Mitsubishi Heavy Industries, Ltd. It manufactures motor vehicles bearing both Chrysler and Mitsubishi trademarks and distributes them for sale through the Chrysler dealer network. Chrysler International, S.A. ("CISA") is a wholly-owned Swiss subsidiary of the Chrysler Corporation, responsible for Chrysler distribution outside of the continental United States.

In 1979 Soler became a Chrysler distributor, supplying dealers in metropolitan San Juan, Puerto Rico, by entering into a Distributor Agreement with CISA. At the same time, Soler entered into a Sales Procedure Agreement with Mitsubishi and CISA providing for the supply of certain Mitsubishi-manufactured vehicles to Soler. Article VI of the Sales Procedure Agreement includes the following arbitration clause:

> All disputes, controversies or differences which may arise between MMC and BUYER [Mitsubishi and Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

Article XIV of the Agreement is a choice-of-law clause:

> This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein.

In 1982 Mitsubishi concluded that Soler had breached the Sales Procedure Agreement by, among other things, failing to pay for vehicles that it had ordered. Mitsubishi therefore filed the instant action in federal district court in Puerto Rico to compel arbitration of its claims against Soler and, at about the same time, filed a request for arbitration with the Japan Commercial Arbitration Association.

In its responsive pleading in the District Court, Soler denied Mitsubishi's allegations and asserted counterclaims against Mitsubishi and CISA charging, among other things, violations of U.S. and Puerto Rican statutes. One of Soler's counterclaims alleged that Mitsubishi and CISA violated the Sherman Act by unlawfully dividing markets and, to that end, preventing Soler from transshipping Mitsubishi-manufactured vehicles to Chrysler dealers in the continental United States and elsewhere outside Puerto Rico. The District Court ordered arbitration of Mitsubishi's claims and Soler's counterclaims against Mitsubishi,[4] and Soler appealed.

The Court of Appeals agreed with the District Court that Soler's statutory counterclaims, including its federal antitrust counterclaim against Mitsubishi, were within the scope of the arbitration clause. It held, however, that the Sherman Act counterclaim concerned a subject matter not capable of settlement by arbitration, because arbitration of antitrust claims arising in international

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[4] The District Court retained jurisdiction of certain counterclaims that it found were outside the scope of the arbitration clause, including Soler's antitrust counterclaim against CISA. Appendix to the Petition for a Writ of Certiorari B-12. On appeal, neither party challenged this decision. *Id.* at A-7.

commercial disputes involving products sold in the United States would unacceptably weaken U.S. antitrust enforcement. Accordingly, the Court of Appeals reversed the part of the District Court's judgment that submitted Soler's antitrust claim against Mitsubishi to arbitration. The decision of the Court of Appeals is now before this Court for review.

SUMMARY OF ARGUMENT

Federal courts should exercise their jurisdiction according to principles that accommodate the jurisdiction of foreign courts and other tribunals that share responsibility for resolving transnational disputes. By denying the arbitrability of antitrust claims arising out of an international business transaction, the court below failed to heed this Court's warnings against automatically exalting the primacy of U.S. law over foreign law and created an unjustified exception to this country's strong policy in favor of international arbitration.

Modern international arbitrations frequently involve disputes that are factually and legally complex. International arbitrators, using the procedures of international arbitration institutions such as the ICC, are entirely capable of deciding, swiftly and accurately, claims based on U.S. antitrust laws. Moreover, arbitrating claims of anticompetitive conduct in connection with international contracts will not impair the U.S. interest in having persons whose business transactions affect its markets comply with U.S. laws.

ARGUMENT

The ICC respectfully submits that this Court should rule that U.S. antitrust and other statutory claims arising out of international business transactions are "capable of settlement by arbitration" within the meaning of Article II(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[8] The ICC demonstrates in Part I of this brief that international arbitration is a process entirely capable of deciding, swiftly and fairly, claims based on U.S. antitrust laws. In Part II we show that the U.S. interest in compliance with its antitrust laws by persons whose commercial dealings affect U.S. commerce will not be injured by giving effect to contracting parties' agreements to arbitrate all claims arising out of their commercial dealings, including claims of anticompetitive conduct. As a preface to these two points, however, the ICC wishes to refer to the general principles that this Court's recent decisions have established for the resolution of questions such as those presented in this case.

Beginning with its seminal ruling in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court has sought to dislodge the "parochial concept" that the United States should seek to "have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* at 9. As international commerce expands, so does the need for the courts of each nation to develop and apply principles that limit the exercise of their own jurisdiction out of respect for the jurisdiction of foreign courts or tribunals and that respond to the needs of the international trading system for swift, predictable resolution of disputes.

In *The Bremen*, a U.S. oil company commenced a suit in admiralty in a United States district court against a

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[8] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1958) (implemented by 9 U.S.C. §§ 201-08 (1982)).

German corporation, although the parties had entered into a freely negotiated international towage contract containing a clause that selected a foreign forum, and by implication foreign law, for the resolution of any disputes. The Court held that, absent "fraud, undue influence, or overweening bargaining power," *id.* at 12, forum-selection clauses in international contracts should be respected by the U.S. courts. The argument that forum-selection clauses should be unenforceable because they "oust" the jurisdiction of the federal courts was, in the Court's view, "a vestigial legal fiction," having "little place in an era when all courts are overloaded and when businesses . . . now operate in world markets." *Id.* In addition, the Court held that the prospect that a foreign forum would enforce provisions in the towage contract that might exculpate the German corporation, while a U.S. court might not enforce those provisions, was not a reason for refusing to enforce the forum-selection clause. *Id.* at 15.

Two years later, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court held that U.S. courts must respect and enforce arbitration clauses in international agreements, even where the dispute sought to be arbitrated involves claims of a violation of the U.S. securities laws. The Court said:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.[6]

The *Scherk* decision has been widely influential, both in the United States and abroad.[7]

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[6] *Id.* at 516.

[7] Judge Friendly, writing for a unanimous panel, followed the teaching of *Scherk* in deciding *AVC Nederland B.V. v. Atrium In-*

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), decided three years ago, involved an air crash in Scotland that killed several citizens and residents of Scotland. Actions for damages were brought in the United States and in the United Kingdom, and the defendants in the United States moved to dismiss on grounds of *forum non conveniens*. The plaintiff in the U.S. action opposed the motion, candidly admitting that she preferred to litigate in the United States because its laws on liability and damages were more favorable than Scottish laws. The Court ruled that a plaintiff may not defeat a *forum non conveniens* motion merely by showing that the substantive law to be applied in an alternative, foreign forum is less favorable to the plaintiff than the law applied in the U.S. forum. The Court concluded that the remedies offered by Scottish courts were not wholly inadequate and said that, although the potential damage awards for the relatives of decedents "may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255.

The case now before the Court provides an opportunity to reaffirm the principles established in these earlier decisions. U.S. courts must continue to view themselves as part of an international legal order in which respect for other tribunals and moderation in exercising jurisdiction

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vestment Partnership, 740 F.2d 148 (2d Cir. 1984). After deciding that the plaintiff's federal securities law claim was within the subject-matter jurisdiction of the federal courts (an issue that this Court did not address in *Scherk*, 417 U.S. at 515 n.8, 516 n.9, 518 n.12), the court affirmed the trial court's dismissal of the claim because the parties had agreed that disputes between them should be decided by a Dutch court according to Dutch law. Judge Friendly concluded that U.S. interests in enforcing the federal securities laws should not allow foreign investors "to escape from a forum-selection/choice-of-law clause." 740 F.2d at 159. *See also* Sanders, *Trends in the Field of International Commercial Arbitration*, 145 [1975-II] Hague Recueil des Cours 205, 225-27 (1976).

are indispensable elements of comity among nations.[8] Arbitration of transnational commercial disputes is an essential part of this system. International arbitration, as carried out under the auspices of institutions such as the ICC's Court of Arbitration, should be encouraged, not denigrated, by the courts of the United States.

I. INTERNATIONAL ARBITRATION IS A PROCESS WELL-SUITED TO RESOLVING ANTITRUST CLAIMS.

A principal reason why the court below refused to compel arbitration of Soler's antitrust claim was a misplaced concern about the capability of the arbitral process to resolve such claims. Relying heavily upon *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), the court stated that arbitrations are "ill-adapted" to deciding complicated issues calling for extensive evidence and requiring application of "sophisticated jurisprudence." The court also believed that international arbitrators might be unable to apply U.S. antitrust law impartially and accurately.[9] These conclusions reflect a lack of familiarity with international arbitration.

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[8] In relation to U.S. antitrust jurisdiction, two lower federal courts have taken significant strides in this direction. They determined that a decision to exercise jurisdiction over a federal antitrust claim requires, in the interests of comity and international relations, a balancing of the interests in favor of exercising jurisdiction against the foreign interests potentially harmed by the U.S. action. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), *on remand*, 1984-1 Trade Cas. (CCH) ¶ 65,775 (N.D. Cal. 1983). *See generally* Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 Am. J. Int'l L. 783 (1984).

[9] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 162 (1st Cir. 1983).

A. Arbitral Procedures Are Designed To Resolve Disputes After a Full Development of the Relevant Facts and In Conformance With the Applicable Law.

The procedures of the ICC Court of Arbitration[10] are designed to resolve transnational business disputes fairly and efficiently, after full development of the facts and in conformance with the applicable law. Its procedures are similar to, and in many respects identical to, the procedures used by other international arbitral bodies such as the American Arbitration Association,[11] the London Court of International Arbitration,[12] the Netherlands Arbitration Institute,[13] and the Japan Commercial Arbitration Association,[14] the authority chosen by Soler and Mitsubishi. Accordingly, the following description of ICC procedures will demonstrate the suitability of arbitration generally as a means of resolving factually or legally complex disputes.

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[10] The Rules for the ICC Court of Arbitration ("ICC Rules") are reprinted in 1 Y.B. Com. Arb. 158 (1976) and 8 Y.B. Com. Arb. 200 (1983). *See generally* Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 Bus. Law. 1685 (1983).

[11] *See* Commercial Arbitration Rules (1981) (reprinted in 7 Y.B. Com. Arb. 191 (1982) and 8 Y.B. Com. Arb. 195 (1983) (supplementary procedures)).

[12] *See* International Arbitration Rules (1981) (reprinted in 7 Y.B. Com. Arb. 223 (1982)).

[13] *See* Arbitration Rules (1979) (reprinted in 7 Y.B. Com. Arb. 228 (1982)).

[14] *See* Commercial Arbitration Rules (1971) (reprinted in Joint Appendix 208 ("J.A.")). In addition, the United Nations Commission on International Trade Law has adopted arbitration rules. UNCITRAL Arbitration Rules (1976) (reprinted in 2 Y.B. Com. Arb. 161 (1977)). They are frequently used in ad hoc arbitrations and also function as model rules for permanent arbitral bodies preparing their own rules.

The parties first select their arbitrator or arbitrators, with or without the assistance of the ICC Court, and then with the arbitrator draw up the "terms of reference." ICC Rules art. 13. The terms of reference summarize the parties' claims, define the issues to be determined, and specify the place of arbitration and applicable procedural rules not covered by the ICC Rules. The terms of reference define the scope of the arbitration and organize the needs of the hearing. The arbitrator also decides the language or languages in which to conduct the proceedings by taking into consideration all relevant circumstances, including the language of the contract and the languages of the parties and their counsel. ICC Rules art. 15(3).

Thereafter, the proceedings move quickly into the fact-finding stage. The arbitrator is obligated to "establish the facts of the case by all appropriate means." ICC Rules art. 14. As a matter of practice, ICC arbitrations in complex cases involve extensive fact-finding efforts. Arbitrators typically combine "the civil-law custom of exchanging documents and written arguments before a hearing" with "the common-law practice of affording the opportunity to examine and cross-examine witnesses at the hearing." [15]

Arbitrators order parties to produce specified documents in their possession or under their control.[16] While arbitrators cannot use coercive legal processes to compel production, they can and do draw adverse inferences from a party's failure to comply with a production order. "In

[15] *ICC Arbitration, supra* note 2, § 23.04, at 9.

[16] The Rules of the Japan Commercial Arbitration Association ("JCAA Rules") provide that a "party may submit evidence" and request the appearance of witnesses and that the tribunal may "request the submission of evidence or the voluntary appearance of a witness or an expert witness." JCAA Rules art. 26(1)-(2), J.A. 218-19.

practice, parties almost always comply with arbitrators' production orders as they prefer not to antagonize the tribunal." [17] Other "discovery" techniques include agreed-upon depositions of witnesses and site visits by the arbitrators.[18]

Documentary evidence is often submitted in great quantities to the arbitrators, but it is always accompanied by briefs or "memorials" to guide the arbitrators through the evidence presented. "The length of memorials and briefs depends on the complexity of the case. In one recent major construction case, each side filed original memorials and counter-memorials totalling nearly 1000 pages (evidentiary materials, of course, were produced in many times that quantity)." [19]

Hearings and oral testimony occur after the exchange of documents and briefs. Again, while the arbitrator cannot compel the attendance of witnesses, the failure of a party to produce a witness whom the arbitrator desires to hear can lead to adverse inferences being drawn against that party. Arbitrators often take the leading role in examining witnesses, especially expert witnesses appointed by the arbitrators themselves to assist the tribunal. ICC Rules art. 14(2). Whether a witness is examined by the tribunal or the party presenting him, arbitrators ordinarily allow counsel "a fair measure of cross-examination on all significant issues brought up in the witness' main statement." [20]

The arbitrator then decides the case, and his decision must be in conformance with the applicable law.[21] One com-

[17] *ICC Arbitration, supra* note 2, § 26.01, at 32.

[18] *Id.* §§ 26.02, 26.03. *See* JCAA Rules art. 27, J.A. 219.

[19] *ICC Arbitration, supra* note 2, § 24.03, at 16.

[20] *Id.* § 25.02, at 24.

[21] 2 J. Wetter, *The International Arbitral Process: Public and Private* 503 (1979); R. Altenmüller, *Die schiedsrichterliche Ent-*

mentator, noting the "duty" of arbitrators "to decide according to the law," states: "Only the application of rules of law can give that amount of predictability and certainty which commercial relations require."[22] For those arbitrations applying the law of a Member State of the EEC, the European Court of Justice stated the governing rule for arbitrators: "Community law must be observed in its entirety throughout the territory of all the Member States . . . ."[23] Briefing by the parties and expert opinions when necessary assist the arbitrator in ensuring that the law is correctly applied.[24]

Expeditious proceedings are encouraged by the requirement that an award must be rendered in written form within six months of the signing of the arbitrator's terms of reference, unless the ICC Court extends the time. ICC Rules art. 18.[25] Article 21 of the ICC Rules requires arbitrators to submit awards in draft form to the ICC Court, which may require modifications as to form and

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scheidung kartellrechtlicher Streitigkeiten 186 (1973). For example, article 33 of the UNCITRAL Rules and article 13(3) of the ICC Rules provide that the arbitral tribunal "shall apply" the applicable law.

[22] Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 Int'l & Comp. L. Q. 132, 158 (1965). The court below was wrong to suggest that arbitrators decide cases using "common sense and simple equity" rather than binding rules of law. 723 F.2d at 162. Under ICC rules, an arbitrator may act as *amiable compositeur* only if both sides agree, ICC Rules art. 13(4), and even then "is not authorized to take a decision contrary to an absolutely constraining law." ICC Case No. 1677 (1975) (abstracted in 3 Y.B. Com. Arb. 217 (1978)). Here, Soler and Mitsubishi chose Swiss law to govern the contract.

[23] *Nordsee v. Reederei Mond*, [1982] E.C.R. 1095, 1111, [1981-1983 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8822.

[24] *ICC Arbitration*, *supra* note 2, § 24.02, at 15.

[25] *See* JCAA Rules arts. 35, 36, J.A. 221.

further consideration of the reasoning.[26] The arbitrators, of course, retain the final word on the substance of the decision.

B. International Arbitrators Are Fully Qualified To Resolve Factually and Legally Complex Disputes.

International commercial arbitrators are well-qualified to address the difficult factual and legal questions that often arise in arbitrations. Almost all international arbitrators are persons of experience and learning drawn from the legal community.[27] Arbitrators in recent or current ICC proceedings include:

Jurists

- Potter Stewart, retired Justice of the Supreme Court of the United States;
- Lord Elwyn-Jones, Lord of Appeal of England and former Lord Chancellor and Attorney General;
- Birgitta Blom, President of the Court of Appeal of Stockholm, Sweden;
- Fritz Falb, Chairman of the Commercial Court of Berne, Switzerland and former President of the Berne Court of Appeal;
- Pierre Bellet, former First President of the Court of Cassation of France and former Chairman of the Second Chamber at the Iran-U.S. Claims Tribunal at the Hague;

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[26] For an example of the ICC Court's scrutiny of an award, see *AB Götaverken v. General National Maritime Transport Co.*, ICC Case Nos. 2977, 2978, 3033 (1978) (abstracted in 6 Y.B. Com. Arb. 133, 139-41 (1981)).

[27] Although the parties typically remain free to chose the arbitrators, many institutional arbitral bodies, such as the ICC, assist the parties in finding arbitrators by drawing on their experience and worldwide contacts. ICC Rules art. 2. *See* JCAA Rules arts. 18-20, J.A. 216-17.

- Philippe Bertin, President of the Paris Court of Appeal;

Scholars

- Giorgio Bernini, Professor of Commercial Law at the University of Bologna, Italy and holder of two advanced legal degrees from the University of Michigan;
- Andreas Lowenfeld, Charles L. Denison Professor of Law at New York University and former Deputy Legal Adviser of the U.S. Department of State;
- Boris Bittker, Sterling Professor of Law at Yale University and noted tax authority;
- Eugen Bucher, Professor of Law at the Universities of Berne, Zurich, and Mannheim;
- Berthold Goldman, Professor of Law and President Emeritus at Paris University;
- Karl-Heinz Boeckstiegel, Professor of International Law at the University of Cologne and President of the Iran-U.S. Claims Tribunal;

Practicing Lawyers

- Charles Brower, U.S. arbitrator at the Iran-U.S. Claims Tribunal and former acting Legal Adviser of the U.S. Department of State;
- Mark Feldman, member of the bars of New York and the District of Columbia and former Deputy Legal Adviser of the U.S. Department of State; and
- Mark Littman, Q.C., barrister-at-law and former Bencher of the Middle Temple.[28] ,

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[28] The panel chosen to arbitrate the dispute between Mitsubishi and Soler consists of three bilingual arbitrators with outstanding credentials: (1) Dr. Ichiro Kato, Chairman of the Civil Law Committee of the Legislation Council and former Dean of the Faculty of Law of the University of Tokyo; (2) Nobuaki Honaka, a former trial judge and now a practicing attorney (Konaka, Toyama & Hosono) in Tokyo with 12 years experience as an arbitrator; and (3) Kazuo Ihara, a practicing attorney (Ihara & Ihara) in Tokyo, who studied law in the United States and wrote several articles on Japanese antitrust law.

It is therefore quite wrong to suggest, as the court below did, that antitrust claims are too complicated to be dealt with by lawyers and jurists of this calibre. It is likewise wrong to say that international arbitrators are "from the business community," 723 F.2d at 162, and cannot be trusted to apply U.S. antitrust law correctly. As a group, arbitrators of international commercial disputes are no less qualified than federal judges to resolve cases involving difficult and complex factual and legal issues—and they are clearly far more qualified than juries to decide the complicated questions sometimes presented under U.S. antitrust law.[29]

C. The Practice of Modern International Arbitration Is To Decide Complex Statutory Claims, Including Claims Based on Competition Law.

The myth that U.S. antitrust claims are too complicated or too difficult to be handled by arbitration is further debunked by an examination of the disputes actually handled in modern commercial arbitration practice. Arbitrators regularly resolve disputes that are factually complex and that involve complicated statutory and regulatory claims, including antitrust or competition law claims.

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[29] *See In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1085-86 (3d Cir. 1980) (due process requires trial by the judge alone when a case is so complex that a jury would be unable to render a verdict resting on the applicable legal principles and the evidence presented at trial); Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 Mich. L. Rev. 1571 (1983); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43 (1980).

In a recent ICC case, an Italian manufacturer of rugs sought to have the arbitrator award damages for nonperformance of an exclusive distributorship contract with a French company. Before ruling, the Swiss arbitrator found it necessary to test the validity of the contract under one of the competition provisions of European Community law, Article 85 of the EEC Treaty, and appropriate Commission regulations. The arbitrator concluded that the contract did not violate Article 85. ICC Case No. 2811 (1978) (abstracted in 106 *Journal du Droit International* 983 (1979)).

In a similar case, a French company sought to arbitrate a dispute under an exclusive distributorship agreement with an Italian company. The Italian company's defense to the claim of nonperformance was that the agreement was void under Article 85. In rejecting the effort of the Italian company to have the matter transferred to the EEC Commission or stayed pending a decision on a related petition before the Commission, the Belgian arbitrator examined the contract under Article 85 and ruled in favor of its validity. ICC Case No. 1397 (1966) (abstracted in 101 *Journal du Droit International* 878 (1974)). *See also* Decision of the Supreme Court of the Canton of Zurich, Switzerland (September 17, 1974), 74 Blätter für Zürcherische Rechtsprechung 73 (1975) (authorizing arbitrators to hear affirmative claim under Swiss competition law).

The dispute leading to the judgment of the European Court of Justice in *Nordsee v. Reederei Mond*, [1982] E.C.R. 1095, [1981-1983 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8822, is an example of complex regulatory issues arising in an arbitration context. In *Nordsee*, three West German shipping groups, as part of a joint shipbuilding project, applied for financial aid under an EEC regulation. When it became apparent there was less aid available than expected, the parties entered into a pooling contract to share whatever aid was received. Two of

the shipping groups later refused to share with the third, and that group then requested arbitration in accordance with the agreement. The arbitrator investigated whether the pooling agreement was illegal under West German civil law, concluded that it was not, and went on to find that the obligation to repay depended on an interpretation of EEC regulations.

There are many other examples of arbitrations involving complex factual situations or difficult legal issues. For example:

- In a 1982 ICC arbitration, two Yugoslav claimants sought to annul a compensation contract with a Swiss company which called for the export of goods from Yugoslavia against the import of other goods. The arbitration panel, after determining that Yugoslav law was applicable, voided the contract on the ground that it violated Yugoslav foreign exchange regulations. ICC Case No. 2930 (1982) (abstracted in 9 Y.B. Com. Arb. 105 (1984)).

- Another recent ICC arbitration involved claims by Southern Pacific Properties, a large Hong Kong company, against Egypt and an Egyptian public sector company. Southern Pacific contracted to develop two massive tourist projects in Egypt, and the Egyptian government later cancelled the projects after much expense and effort had been committed. The arbitrators considered not only extensive factual evidence, but also difficult questions of Egyptian law relating to the ability of the government to conclude an arbitration agreement and the applicability of public international law principles. *S.P.P. (Middle East) Ltd. v. Arab Republic of Egypt*, ICC Case No. 3493 (1983), 22 I.L.M. 752 (1983).

- An ICC arbitration panel recently rendered a preliminary award in a multiparty case involving a British company and four Middle Eastern states.

The States had, by treaty, created the Arab Organization for Industrialization ("AOI") to assist in developing an arms industry beneficial to the states. AOI entered into agreements with the British company to create a helicopter manufacturing business. AOI was dissolved in 1979 as a result of the Camp David Accords, and the arbitrators were required to deal preliminarily with the question of whether the four sovereign governments had agreed to submit themselves to arbitration. *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, ICC Case No. 3879 (1984) (interim award), 23 I.L.M. 1071 (1984).

- Nationalizations and expropriations of oil concessions have led to several complex arbitrations. In *Kuwait v. American Independent Oil Co.*, ad hoc (1982), 21 I.L.M. 976 (1982) (abstracted in 9 Y.B. Com. Arb. 71 (1984)), for example, the damages claimed ran into the billions of dollars and the relevant facts covered a thirty-year period. *See also Libyan American Oil Co. v. Government of the Libyan Arab Republic*, ad hoc (1977), 20 I.L.M. 1 (1981) (abstracted in 6 Y.B. Com. Arb. 89 (1981)); *Texaco Overseas Petroleum Co. v. Government of Libyan Arab Republic*, ad hoc (1977), 17 I.L.M. 3 (1978) (abstracted in 4 Y.B. Com. Arb. 177 (1979)); *British Petroleum Co. v. Government of the Libyan Arab Republic*, ad hoc (1973), 53 I.L.R. 297 (1979) (abstracted in 5 Y.B. Com. Arb. 143 (1980)).

It must also be remembered that notwithstanding the *American Safety* rule, U.S. courts will compel arbitration of antitrust claims when the arbitration agreement is made *after* the dispute has arisen. *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Cobb v. Lewis*, 488 F.2d 41, 48 (5th Cir. 1974) (dicta). There is no reason to suppose

that these antitrust claims are less difficult or more suited to arbitration than antitrust claims generally.[20]

II. THE U.S. NATIONAL INTEREST IN COMPLIANCE WITH ITS ANTITRUST LAWS DOES NOT REQUIRE THAT ANTITRUST CLAIMS ARISING IN INTERNATIONAL COMMERCIAL TRANSACTIONS BE EXEMPT FROM ARBITRATION.

The second concern offered to justify a ruling that U.S. courts have no obligation under the Convention to refer antitrust claims to arbitration is that compelling arbitration would grant contracting parties "immunity from antitrust law" and therefore would unacceptably impair U.S. policy interests in "preserving a competitive atmosphere." 723 F.2d at 163, 168. That concern is misplaced because, as we now show, U.S. interests in ensuring compliance with the requirements of its antitrust laws will not be impaired if this Court decides to respect the terms

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[20] The court below was incorrect in observing that its "insistence on a judicial forum for antitrust claims in international agreements has a precedent in the laws of Germany." 723 F.2d at 168, 163 n.8. Section 91(1) of the German Act Against Restraints on Competition requires only that arbitration clauses in cartel and other horizontal agreements leave each party with the option of going to court. More important, distributorship agreements and other vertical arrangements are not covered by the provision, thus permitting the parties to such agreements to make arbitration the exclusive means of resolving disputes. Finally, the German antitrust authorities have the power, under section 91(1), to approve compulsory arbitration clauses in export cartel agreements, and they routinely grant the approval when non-German firms are members of the cartel. *See* E. Langen, E. Niederleithinger, L. Ritter & U. Schmidt, *Kommentar zum Kartellgesetz* § 91, Rdnr. 7 (6th ed. 1982).

Swiss law is similar, but more broadly permits compulsory arbitration in connection with agreements "to which persons having their domicile abroad are parties, if it is provided that disputes shall be judged by an international court of arbitration." Federal Act on Cartels and Similar Organizations of 20 December 1962, art. 15(3) (English translation in *Competition Law in Western Europe and the U.S.A.* at SW.L.I-4 (Gijlstra ed. 1983)).

of the Convention and refer to arbitration claims of anti-competitive conduct arising out of international contract relations. Upon analysis, it is clear that in reality no substantial tension exists between U.S. interests in its antitrust policy and adherence to the Convention. Certainly there is insufficient tension to warrant a wholesale exemption of antitrust claims from arbitration under the Convention.

A. The purpose of the U.S. antitrust laws, as the court below recognized, is to encourage all participants in U.S. markets to behave competitively for the benefit of consumers. That interest would be fully satisfied even if federal courts compel arbitration of antitrust claims. As Part II(C) of the brief amicus curiae of the American Arbitration Association demonstrates, there will always be a large number of potential plaintiffs, both public and private, that will be unaffected by agreements to arbitrate and therefore will be free to sue in federal court. The prospect of criminal proceedings, civil injunctive actions, and private treble-damage suits provides parties to international transactions affecting U.S. commerce with substantial incentives to conform their conduct to the requirements of U.S. antitrust law.[31] These incentives are not materially reduced simply because the parties to the contract agree to arbitrate disputes arising between them.[32]

B. There is a second reason why parties to international commercial transactions affecting U.S. markets will

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[31] *See* Johnson, *International Antitrust Litigation and Arbitration Clauses*, 3 J. L. & Com. 91, 104-05 (1983).

[32] It is worth noting that in the instant case Soler remains free to pursue its antitrust claims against CISA, which is not a party to the arbitration clause and which would be individually liable for the whole amount of Soler's damages caused by the allegedly unlawful combination between CISA and Mitsubishi. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). The District Court retained jurisdiction over Soler's Sherman Act claim against CISA. *See* note 4 *supra*.

continue to have ample incentives to obey U.S. antitrust laws, even if they must arbitrate all disputes between them: Arbitral tribunals are not likely to enforce agreements—or require the payment of damages for breach of agreements—"when a mandatory national law in effect at the place of performance forbids such performance."[33] This principle has been followed by arbitrators in cases involving contracts raising questions of validity under EEC competition law[34] and in cases where the contract contemplated the making of illegal payments.[35]

Thus, in the instant case, Mitsubishi will be unable to obtain the relief it seeks against Soler in the arbitration if the Chrysler-Mitsubishi distribution arrangement and the refusal to permit Soler to transship vehicles to the U.S. mainland are found by the arbitrators to be contrary to the dictates of the Sherman Act.[36] The prospect of

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[33] *ICC Arbitration, supra* note 2, § 17.04, at 89.

[34] The cases discussed in the text on page 18 are examples. *See ICC Arbitration, supra* note 2, § 17.04, at 89-90. *See also* ICC Doc. No. 420/259, Report of the Joint Working Party on Arbitration and Competition, "Arbitration and Competition," at 4-5 (April 6, 1984) (approved by the ICC Executive Board at its 36th Session) ("Without wishing to serve as a substitute for the arbitrators themselves, the International Chamber of Commerce takes up the same position as that expressed by the Commission [of the European Communities] . . .: when it is applicable community competition law must be respected . . . .").

[35] *ICC Arbitration, supra* note 2, § 17.04, at 90-91.

[36] The Sherman Act obviously is a mandatory law in effect in both Puerto Rico, *see* 15 U.S.C. § 3 (1982); *People of Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), and the United States, *see* 15 U.S.C. § 1 (1982). Whether the marketing arrangements between Chrysler and Mitsubishi, or the restrictions on transshipment imposed on Soler, are indeed unlawful under the Sherman Act is, at best, dubious. *See* J.A. 206-07 (Department of Justice Business Review Letter approving Mitsubishi-Chrysler marketing arrangements); *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-55 & n.23 (1977) (vertical restrictions may enable manufacturers to ensure dealer performance of service and repair obligations).

being without an arbitral remedy if one's international agreement fails to conform to the requirements of the U.S. antitrust laws by itself creates a strong incentive to obey those laws.

C. To be sure, the prospect that arbitrators will not enforce a contract that is invalid in the place of performance does not address the question of a party's affirmative claim for damages allegedly caused by its contractual partner's antitrust violation. When such a claim is raised, as it is in this case, U.S. antitrust policy will, of course, be vindicated when an arbitrator applies the law of the United States to resolve the claim. Whether the arbitrator will apply U.S. law in a particular case depends upon several considerations. The most important factors are the terms and scope of the choice-of-law provision in the contract and, absent such a provision, upon a proper application of the appropriate principles of conflict of laws,[37] but a further factor that international arbitrators increasingly consider is the significance of the relationship between the United States and the facts of the underlying claim of anticompetitive conduct.[38]

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[37] In accordance with the principle of "party autonomy," the ICC Rules, for example, provide that the parties are "free to determine the law to be applied by the arbitrator to the merits of the dispute," and in the absence of such a determination the arbitrator "shall apply the law designated as the proper law by the rule of conflict which he deems appropriate." ICC Rules art. 13(3). In practice, this latter provision means that, absent party choice, the ICC arbitrator usually makes his choice of substantive law based on a consideration of the conflicts principles applied by each of the jurisdictions having a relation to the dispute. "By reference to the various potentially applicable rules of conflict, the arbitrators are able to infuse an international element into the proceedings and assure both parties that the issue has not been determined by the narrow application of the system of a single State, whose relation to the dispute is not necessarily predominant." *ICC Arbitration*, *supra* note 2, § 17.02, at 79.

[38] According to leading German and French authorities, there is a growing tendency of international arbitrators to take into account the antitrust laws and other mandatory legal rules expressing public policy enacted by a state that has a significant relationship to the facts of the case, even though that state's law does not govern the contract by virtue of the parties' choice or applicable conflicts rules. Steindorff, *Kartellrecht und Schiedsgerichtsbarkeit*, 1984 Wirtschaft und Wettbewerb 189, 197; Derains, *Arbitrage et droit de la concurrence*, 14 Rev. suisse du droit international de la concurrence 39, 56-57 (1982).

Nevertheless, the possibility remains that an arbitrator might not apply U.S. antitrust law in deciding a party's affirmative claim for damages based on the other party's anticompetitive conduct. In the instant case, for example, CISA, Mitsubishi, and Soler provided that their Sales Procedure Agreement would be "governed by" the laws of Switzerland "in all respects . . . as if entirely performed therein." J.A. 56. Conceivably, although we believe it unlikely, the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act.

A decision not to apply U.S. antitrust laws does not mean, however, that a party injured by anticompetitive conduct is without a remedy in the arbitration or, here, that Mitsubishi has nothing to fear from Soler if it has injured Soler by conduct of that kind. The United States is not the only jurisdiction with competition laws that provide damage remedies for injured private parties.

Most of this country's major trading partners foster competition with laws similar to U.S. antitrust laws. Besides the well-known provisions of Articles 85 and 86 of the EEC Treaty, which are enforceable by private actions for injunctions and damages in the national courts of the EEC Member States,[39] statutes designed to ensure free com-

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[39] *See* E. Grabitz, *Kommentar zum EWG-Vertrag* art. 85, Rdnr. 149-52 (1984) (citing cases); Temple Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 Comm. Mkt. L. Rev. 335

petition are also found in the legal systems of, among other states, Argentina, Australia, Austria, Brazil, Canada, Denmark, Finland, France, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Venezuela, Spain, Sweden, Switzerland, the United Kingdom, and West Germany.[40] In many of these jurisdictions, the national competition laws also create private rights of action for the benefit of injured parties. Swiss law, for example, condemns measures that unduly hinder competition when the measures are taken by a cartel, firms linked by contractual means, or a dominant firm.[41] It also provides that injured parties may seek injunctions and damages.[42] Accordingly, even when foreign law applies in an arbitration to claims for damages based on anticompetitive conduct, in most cases a foreign competition law will be available to preserve an injured party's right to compensation and provide the desired deterrent effect.

(1981). For a general discussion of the substance of EEC competition law, see ABA Antitrust Section, *Antitrust Law Developments* 573-98 (2d ed. 1984).

[40] *See* OECD, *Guide to Legislation on Restrictive Business Practices* (1981); *World Law of Competition* (von Kalinowski ed. 1984); *Competition Law in Western Europe and the U.S.A.* (Gijlstra ed. 1983). The laws most often chosen by the parties in contracts containing ICC arbitration clauses are those of England, France, and Switzerland. *ICC Arbitration*, *supra* note 2, § 17.04, at 86.

[41] Federal Act on Cartels and Similar Organizations of 20 December 1962, arts. 2-5 (English translations in [Switzerland] B6, *World Law of Competition*, Pt. 11, § 1.02 nn.5-7 (von Kalinowski ed. 1984); *Competition Law in Western Europe and the U.S.A.* SW.L.I-1 to -2 (Gijlstra ed. 1983)). "A bundle of vertical distribution agreements by which an enterprise imposes identical resale conditions [on] its dealers is considered as a cartel by the [Swiss] Cartel Commission (Publ. 1978, p. 197—spare parts for cars)." K. Spoendlin, *id.* at SW.C-2.

[42] Art. 6, *id.* at SW.L.I-2.

D. Finally, a decision to reverse the ruling of the court below does not require this Court to hold that U.S. antitrust interests are never a relevant consideration in ordering arbitration or enforcing arbitral awards. Just as it did in similar circumstances in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981), the Court should recognize that federal courts have discretion to assess whether, in a particular case, an arbitration did not take or would not take competition concerns adequately into account. Ordinarily, of course, this discretion should be exercised only at the stage that recognition and enforcement of an award is sought, after a party demonstrates to the federal court that the arbitration was "so clearly inadequate or unsatisfactory" that it failed to allow consideration of a claim or defense under U.S. antitrust law or a comparable foreign competition law. *See id.* at 254 n.22.

A general rule requiring federal courts to compel arbitration of claims of anticompetitive conduct arising out of international contract relations, and to await the recognition and enforcement stage before assessing whether competition concerns were adequately addressed, is sensible and workable for the following reasons:

1. It is consistent with the national policy in favor of arbitration[43] and with the Convention. The Convention provides just a few, narrowly drawn exceptions to a national authority's obligation to compel arbitration but offers broader grounds for denying recognition and enforcement of an arbitral award. Specifically, Article V(2)(b) preserves each country's right to refuse enforcement if the "award would be contrary to the public policy of that country."[44]

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[43] *See Southland Corp. v. Keating*, 104 S. Ct. 852, 858 (1984).

[44] In *Scherk*, this Court noted the distinction between referring matters to arbitration and reserving the power to refuse recognition and enforcement of arbitral awards. 417 U.S. at 519 n.14.

2. At the enforcement stage, a federal court will have access to the record of the arbitration. Without engaging in a review more searching than one typically used before enforcing an award covered by the Convention,[48] the court will be able to determine whether the arbitration adequately took competition concerns into account. It will not need to speculate about the substance of potentially applicable foreign law, the ability of arbitrators, or the suitability of the arbitral proceeding, and thus will not be put in the position of "demean[ing] the standards of justice elsewhere in the world, and unnecessarily exalt-[ing] the primacy of United States law over the laws of other countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. at 517 n.11.

3. A general rule in favor of compelling arbitration of competition claims in connection with an international business transaction will conserve scarce judicial resources. As Part I of this brief demonstrated, the arbitral process is eminently capable of resolving antitrust and competition claims accurately and fairly. Requiring the parties to arbitrate their commercial dispute will normally preclude the need for judicial intervention because the parties, if they do not settle, are overwhelmingly likely to comply voluntarily with the award rendered by the arbitrators. *See* page 2 *supra*.

CONCLUSION

For the foregoing reasons, the Court should decide that claims of anticompetitive conduct arising in connection with an international business transaction are capable of settlement by arbitration and that, when such claims—whether raised under U.S. or foreign antitrust law—fall within the scope of a valid arbitration clause, federal

[48] *See* McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 Nw. J. Int'l L. & Bus. 58 (1982); Aksen, *Application of the New York Convention by United States Courts*, 4 Y.B. Com. Arb. 341 (1979).

courts should refer them to arbitration pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards.

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PETITIONER'S

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether arbitration of claims asserted under the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, may be compelled under Chapter One of the Federal Arbitration Act, 9 U.S.C. §§ 1-4.

2. Whether arbitration of claims asserted under the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, may be compelled under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (entered into force for the United States December 29, 1970), *implemented by* Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201-208.

The Parties

In addition to the parties listed in the caption, Chrysler International, S.A. ("CISA") is an additional defendant on certain of the counterclaims pleaded by respondent in the District Court. Moreover, there is pending before the District Court an application by respondent for leave to amend its counterclaims to add Chrysler Corporation ("Chrysler") as an additional defendant on both its federal and Puerto Rico antitrust counterclaims. All of the issued and outstanding stock of petitioner Mitsubishi Motors Corporation is owned by Mitsubishi Heavy Industries, Ltd., a publicly traded Japanese corporation, and Chrysler. Petitioner is informed and believes that CISA is a wholly-owned subsidiary of Chrysler; the stock of CISA is not publicly traded. Petitioner is not aware of any other person which is either a parent or subsidiary of any of the parties described above, the stock of which is publicly traded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 83-1569 and 83-1733

MITSUBISHI MOTORS CORPORATION,

Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,

Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

Petitioner Mitsubishi Motors Corporation hereby submits its brief in support of its appeal from the judgment of the United States Court of Appeals for the First Circuit (No. 83-1569). Pursuant to agreement of the parties, this brief is limited to that appeal and does not address the issues presented by the cross-petition (No. 83-1733).

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 723 F.2d 155 (1st Cir. 1983), and is annexed to the Petition for Certiorari as Appendix

A. The opinion of the United States District Court for the District of Puerto Rico, not officially reported, is annexed to the Petition for Certiorari as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on December 20, 1983 and is annexed to the Petition for Certiorari as Appendix C. The Petition for Writ of Certiorari was timely filed on March 19, 1984 and was granted on October 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes and Treaty Involved

The statutory provisions and treaty involved are Sections 1 through 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1-4, which are annexed to the Petition for Certiorari as Appendix D; Sections 201 through 208 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, which are annexed thereto as Appendix E; and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (1970), which is annexed thereto as Appendix F.

Statement of the Case

A. The Parties

Plaintiff and petitioner Mitsubishi Motors Corporation ("MMC") is a Japanese corporation with its principal place of business in Tokyo, Japan. Pursuant to a contract entitled

"International Distribution Agreement" between MMC and Chrysler International, S.A. ("CISA"), a wholly-owned subsidiary of Chrysler Corporation ("Chrysler"), MMC manufactured vehicles for sale by CISA in certain territories outside the continental United States, including Puerto Rico. (PA 6)[1] As of the time of the facts giving rise to this dispute, those vehicles bore the "Plymouth" or "Dodge" brand name, as well as the "Mitsubishi" brand name, and were sold through CISA's dealer network in those territories. (JA 59)

Prior to 1970, Mitsubishi Heavy Industries, Ltd., a Japanese corporation, was engaged in manufacturing automobiles, but had no distribution network for its vehicles in the United States. In 1970, MMC (which is now owned 85% by MHI and 15% by Chrysler) was formed. (JA 200-201) Later that same year, MMC entered into a "United States Distribution Agreement" with Chrysler and, in 1971, a "Minor Market Distribution Agreement" (superseded in July, 1979 by the International Distribution Agreement with CISA), which respectively appointed Chrysler and CISA as the exclusive distributors of MMC-built vehicles in the United States and in numerous countries outside of Japan. (JA 201) As a result, Chrysler-Plymouth and Dodge dealers throughout the United States and Puerto Rico began selling certain vehicles manufactured by MMC for Chrysler, while continuing to sell Chrysler-manufactured vehicles. Now, and at all times relevant to this action, Chrysler-Plymouth and Dodge dealers have continued to sell MMC-built vehicles.

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[1] References to the Joint Appendix are in the form "JA [page number]." References to the Appendices to the Petition for Certiorari are in the form of "P [appendix] [page number]." References to the Record before the Court of Appeals are in the form "R [page number]."

Defendant-respondent and cross-petitioner Soler Chrysler-Plymouth, Inc. ("SCP"),[2] is a corporation organized under the laws of the Commonwealth of Puerto Rico with its principal place of business in San Juan, Puerto Rico. It formerly held a franchise from CISA to distribute certain vehicles, manufactured or distributed by Chrysler or its subsidiaries, in the metropolitan San Juan aera. That franchise relationship was created by a Distributor Agreement between SCP and CISA, to which MMC was not a party, dated October 31, 1979 (the "Distributor Agreement"). (JA 18-41)

B. Dealings Among MMC, CISA and SCP

On or about October 31, 1979, MMC, CISA and SCP entered into a contract entitled "Sales Procedure Agreement." (JA 42-57) That is the only agreement between MMC and SCP relevant to this action. The Sales Procedure Agreement was intended to facilitate the ordering of MMC-built Chrysler vehicles by SCP, and specifically provided that it did not create a franchisor-franchisee relationship between MMC and SCP. (JA 43, 54; PB 2)

The arbitration clause involved in this action is set forth in the Sales Procedure Agreement. It provides as follows:

> "All disputes, controversies or differences which may arise between MMC and [SCP] out of or in relation to Articles I-B through V of [the Sales Procedure Agreement] or for breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." (JA 52-53)

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[2] SCP is cross-petitioner in No. 83-1733. This brief addresses only the questions presented by MMC's petition.

In SCP's first year of operations, the automobile market in Puerto Rico was very strong. SCP was able substantially to exceed its targeted sales volume of 1,992 vehicles, and in fact sold 3,831 vehicles during that period. (JA 117, 167)

On or about June 24, 1980, SCP, CISA and MMC agreed that SCP's "minimum sales volume" ("MSV") for the 1981 model year (extending from November 1, 1980 to October 31, 1981) would be 4,750 units. (JA 167) By entering into that agreement, SCP assured itself of a certain supply of vehicles at a time when the market for new vehicles was such that demand for MMC-built cars exceeded supply, and SCP also ensured a high level of MMC contributions to its advertising programs, which were fixed with reference to the MSV. (*Id.*) In fact, on July 1, 1980—only one week after it executed its 1981 model year MSV agreement—SCP applied for an increase of $10.6 million in its line of credit from the Bank of America. In its application letter, Joaquin Soler, Jr., President of SCP, stated, with respect to its contemplated 1981 sales:

> "I am enclosing for you a copy of the sales projections of Mitsubishi vehicles, we expect to be able to sell between 7 and 8 thousand for a gross profit of between 3.5 and 4.5 million." (official translation supplied) (JA 197)

Both prior to and after execution of the 1981 MSV agreement, SCP ordered very substantial numbers of vehicles from MMC, and sought on several occasions to increase its monthly orders. (JA 197)

Beginning in August, 1980, MMC personnel repeatedly warned SCP that demand in the automobile market in Puerto Rico was weakening and that SCP's volume of orders was far too high. Notwithstanding that advice, SCP

continued to order vehicles in large numbers for delivery in calendar year 1981. (JA 117) In fact, on September 12, 1980, at a time when SCP's antitrust counterclaims allege that MMC was "forcing" it to accept unwanted vehicles, it requested an increase in its order of September 8, 1980, for vehicles to be produced in November, 1980. (R 567, 597) The record establishes that SCP, contrary to MMC's advice, acted upon an evident belief that demand for new vehicles in Puerto Rico would continue at the levels of the previous model year.

In March of 1981, SCP placed two orders with MMC for a total of 466 additional vehicles. (R 166-67, 172) The following month, SCP placed its first order for the 1982 model year, seeking 500 vehicles. (R 177-78) However, by May, 1981, when those vehicles were already manufactured or in process, SCP discovered that it was unable to pay for the vehicles it had ordered. Beginning on May 27, 1981, SCP repeatedly requested MMC to cancel or postpone its outstanding orders. (JA 162) Although the Sales Procedure Agreement provided that orders were irrevocable, MMC complied with SCP's requests to the extent possible, and did not ship the ordered vehicles. (JA 163) Moreover, MMC extended substantial financial assistance to SCP and to CISA's other Puerto Rico distributors by, among other things, paying "salesmen's incentives" of $385,000, contributing $300,000 for additional local advertising, and storing already manufactured vehicles in Japan without seeking payment of storage charges and liquidated damages provided for in the Sales Procedure Agreement.[3] (JA 126-28)

[3] Both the Sales Procedure Agreement and the Distributor Agreement had expired by their terms on October 31, 1981, and had not been renewed. (JA 163)

C. The Collapse of SCP's Business

By December, 1981, MMC had stored in Japan 966 vehicles manufactured to SCP's order for which SCP could not or would not pay. (JA 61) At the same time, SCP had accumulated an unsold inventory of over 400 MMC-built vehicles in Puerto Rico. (JA 62)

MMC personnel repeatedly met with SCP in an effort to resolve the difficulties in which SCP's poor business judgment had placed it. (JA 68) However, by telex dated February 12, 1982, SCP attempted to disclaim any responsibility for the vehicles manufactured to its order and stored in Japan. (JA 165; PA 6) It is not disputed that shortly thereafter, at a meeting held in Puerto Rico on February 22, 1982, SCP's president stated that SCP would no longer sell MMC-built vehicles. (JA 165-66) The following day, SCP surrendered its inventory of 412 vehicles to its bank, in partial satisfaction of its outstanding debt, and has not conducted its former business since that time. (JA 67, 166)

D. Prior Proceedings

MMC filed its complaint against SCP in this action on March 15, 1982. That action was brought to compel SCP to honor its commitment in the Sales Procedure Agreement to arbitrate before the Japan Commercial Arbitration Association ("JCAA") certain contractual disputes between the parties, arising principally from SCP's failure to pay for 966 vehicles manufactured to its order. (JA 9) Also on March 15, 1982, MMC moved for an order compelling the arbitration sought in the complaint. (JA 58) On March 17, 1982, the District Court entered an order to show cause which set a hearing on MMC's motion for April 30, 1982. On or about March 18, 1982, MMC served

the summons and complaint, together with its demand for arbitration, upon SCP.[4] (JA 70)

On May 7, 1982, one week after the hearing on MMC's motion, SCP served its answer and counterclaims upon MMC and, in addition, joined CISA as a defendant on certain of its counterclaims. SCP's answer denied all of the material allegations of MMC's complaint, and pleaded counterclaims seeking actual and punitive damages exceeding $360,000,000 from MMC, together with injunctive relief, for alleged violations of federal and Puerto Rico antitrust laws, the Automobile Dealer's Day in Court Act, and the Puerto Rico Dealer's Act, 10 L.P.R.A. § 278 *et seq.*, as well as claims for common-law fraud, breach of contract, libel, slander and interference with contractual relations.[5] (JA 76-103)

On May 27, 1982, MMC filed a supplemental motion to compel arbitration of SCP's counterclaims and for a stay pending arbitration of any counterclaims which might be determined to be non-arbitrable. (JA 113-14)

By motion dated July 12, 1982, MMC moved for dismissal or summary judgment as to each of SCP's counterclaims to the extent that such claims were not referred to arbitration. (JA 158) The District Court has not ruled on that motion.

On November 22, 1982, the District Court filed its memorandum opinion and order. (PB 1-13) The court

[4] On May 11, 1982, the District Court entered a preliminary injunction at SCP's request staying prosecution of the arbitration by MMC pending disposition of MMC's motion to compel arbitration. (JA 2)

[5] In response to MMC's pending motion for dismissal or summary judgment on SCP's counterclaims, SCP "withdrew" its claims for $320,000,000 in punitive damages.

held that the action was governed by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (1970). (PB 5) The court ordered that each of the claims pleaded by MMC and, with three exceptions not in issue here, each of the counterclaims pleaded by SCP, be arbitrated in accordance with the parties' argument.[6] (PB 11-12)

With respect to SCP's antitrust counterclaims, the District Court held that, even if such claims would not have been arbitrable had they arisen in a domestic setting, their international status required arbitration. The court held that:

> "[T]he *American Safety* case where the Court held that antitrust claims were not subject to arbitration rested heavily upon the Supreme Court decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953) which held that agreements to arbitrate securities claims involving domestic transactions were unenforceable under Securities Act. Notwithstanding, 'it may well be that the special considerations and policies underlying a "truly international agreement", *Scherk* v. *Alberto-Culver Co., supra*, 417 U.S. 506, at 515 . . . call for a narrower view of nonarbitrability in the international than the domestic context' *Parsons & Wh. Ov. Co., Inc.* v. *Societe G. De L. Du P. (R)*, 508 F.2d 969 (2nd Cir. 1974)

[6] The counterclaims as to which arbitration was not ordered were for an unspecified slanderous statement concerning SCP (PB 10), for an alleged libel set forth in MMC's moving papers in the District Court (PB 10-11), and for MMC's alleged failure to act in good faith in establishing SCP's MSV as well as by allowing other sellers of MMC-built vehicles to invade SPC's allegedly exclusive sales territory. (PB 11)

> "Based on the reasoning of the Court in *Scherk* refusing to extend *Wilko* to international securities transactions, we find that *American Safety* does not govern antitrust claims arriving [sic] from international transactions, such as the present one. Due to the international nature of SCP's antitrust claims, the same are arbitrable." (PB 10)

Upon SCP's appeal from that order, the Court of Appeals affirmed the District Court's holding as to the scope of the arbitration clause.[7] In particular, that court agreed that the arbitration agreement between the parties encompassed SCP's antitrust counterclaim. 723 F.2d at 160-161. However, the Court of Appeals concluded that antitrust claims, even those arising from international commercial transactions, are not arbitrable. The court stated:

> "[W]e must weigh the private party's interest in the arbitration of international contract disputes against the public's interest in the preservation of economic order in the United States. Such a balancing exercise can have only one result: to enforce the private arbitration clause at the expense of public policy would be 'unreasonable'."

723 F.2d at 168. Upon that basis, the Court of Appeals reversed the judgment of the District Court as to SCP's antitrust counterclaim, and remanded the case for further proceedings.

[7] Following entry of the judgment of the District Court, SCP sought a stay of arbitration pending appeal. (JA 4) The District Court denied that application. A similar stay was then sought from the Court of Appeals, which likewise denied the relief sought by SCP. (JA 5) MMC then commenced prosecution of its case before the arbitration tribunal selected by the JCAA.

Upon that remand, SCP moved in the District Court, on January 31, 1984, for an order staying arbitration until the conclusion of judicial proceedings on, *inter alia*, its federal antitrust counterclaim. (JA 6) Following a hearing, the District Court ruled on May 25, 1984, that SCP's antitrust allegations did not "permeate" the case and that they "appear[ed] to be lacking in substance." *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth, Inc.*, No. 82-0538, slip op. at 3, 4 (D. P.R. May 25, 1984). The court, accordingly, stayed the antitrust litigation and ordered the arbitration to proceed. (JA 6)

SCP thereafter moved for reconsideration of the District Court's order. By order dated June 26, 1984, SCP's motion was denied in its entirety.

The arbitration then proceeded promptly. MMC's case in chief was completed, but before SCP presented its defense or any evidence on its counterclaims, it filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1 *et seq*. Inasmuch as the automatic stay provided by 11 U.S.C. § 362 arguably applies to foreign arbitrations, that filing had the effect of again halting the arbitration to which the parties had agreed.[8]

Summary of Argument

The Court of Appeals in the case committed a fundamental error by applying a judicially created "exception" to the Federal Arbitration Act regarding arbitration of antitrust claims. That "exception," first adopted in *American*

[8] Upon motion of SCP, on November 26, 1984, the United States Bankruptcy Court for the District of Puerto Rico vacated the automatic stay with respect to proceedings in this Court upon MMC's petition and SCP's cross-petition. A copy of that order has been filed with the Clerk of this Court.

Safety Equipment Corp. v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), should be disapproved by this Court because it is contrary to the language of the Federal Arbitration Act, its legislative history and the decisions of this Court. Accordingly, it represents an impermissible judicial usurpation of Congress' exclusive authority to limit the applicability of its own statutory creations.

Moreover, even if it were appropriate to permit federal courts to engage in such a typically legislative task, the balance which *American Safety* struck between arbitration and antitrust enforcement is simply wrong. The consequence of the *American Safety* court's erroneous determination is seriously to undermine arbitration as an alternative form of dispute resolution without any concomitant benefit to the enforcement of the antitrust laws. Even more seriously, it encourages destructive legal maneuvering, delay and forum shopping which defeat the purposes of both arbitration and antitrust enforcement.

Accordingly, this Court should reverse the judgment of the Court of Appeals, and conclusively eliminate the "judicially created exception" arising from *American Safety*.

The First Circuit's refusal to enforce the arbitration agreement in respect of SCP's federal antitrust counterclaim also violates the treaty obligations of the United States set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), and the rulings of this Court in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), and *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

The Convention was ratified by the United States Senate on October 4, 1968, and was enacted into positive law by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.* As this Court has observed:

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

Scherk v. *Alberto-Culver Co.*, 417 U.S. at 520 n.15. The structure and text of the Convention and its implementing legislation, as well as its legislative history, make it clear that United States accession to the Convention was intended to recognize the important role of arbitration in international commerce.

Accordingly, in both the domestic and international contexts, Congress has specifically authorized and encouraged the use of arbitration agreements. Antitrust claims are not excluded from the scope of the Federal Arbitration Act or the Convention. Because the Court of Appeals, nonetheless, impermissibly granted such an exception by judicial fiat, its judgment should be reversed.

ARGUMENT

I.

The Federal Arbitration Act Requires That Antitrust Claims Be Arbitrated

The command of the Federal Arbitration Act is unequivocal, and does not exempt any particular class of commercial claims from its coverage. Section 2 of the Act, 9 U.S.C. § 2, provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving

> commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

In *Southland Corp.* v. *Keating*, — U.S. —, 104 S. Ct. 852 (1984), the purpose of the statute was succinctly described:

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. . . . Congress has thus mandated the enforcement of arbitration agreements.
>
> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'"

— U.S. at —, 104 S. Ct. at 858 (footnote and citation omitted).

Neither of the "limitations" recognized in *Southland* is present in this case. The Court of Appeals, like the District Court, held that SCP's antitrust counterclaim was squarely within the scope of the parties' arbitration agreement. 723 F.2d at 160-61. Nonetheless, the court below declined to enforce the arbitration agreement with respect to that counterclaim because of what it characterized as the "judicially created" rule excepting antitrust claims from arbitration. 723 F.2d at 161-62. That "rule", which originated in *American Safety*, has been adopted by several circuits.[9]

The so-called "*American Safety* doctrine" has never been endorsed by this Court, and should now expressly be disapproved. The holding of *American Safety* is at odds with both the Federal Arbitration Act and the decisions of this Court, and constitutes nothing less than a judicial invasion of the legislative domain. That alone mandates rejection of *American Safety*. Moreover, the conclusory assumptions which provide the underpinnings of *American Safety*'s conclusion that antitrust claims should not be arbitrated are demonstrably incorrect. Finally, *American Safety*'s result, which admits of no rational limiting principle, is unacceptable as a policy matter.

A. *American Safety* Is an Impermissible Judicial Usurpation of Congressional Authority

By its terms, the Federal Arbitration Act admits of only two exceptions. The agreement under which arbitration is sought must either be maritime or one "evidencing a transaction involving commerce" and the clause must not be subject to revocation upon "grounds as exist at law or in equity for the revocation of any contract." There is not any dispute in this case, nor was there in *American Safety*,

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[9] *See Lake Communications, Inc.* v. *ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984); *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116 (7th Cir. 1978); *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). *See also Lee* v. *Ply*Gem Industries, Inc.*, 593 F.2d 1266, 1274-1275 (D.C. Cir.), *cert. denied*, 441 U.S. 967 (1979); *Cf. Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971).

that the contract containing the arbitration clause is one "evidencing a transaction involving commerce." Similarly, there is no assertion in either case that the arbitration clause itself is subject to revocation. Thus, the arbitration agreements at issue in *American Safety* and in this case should have been enforced.

Congress enacted the Federal Arbitration Act, and it is, therefore, the prerogative of Congress to create exceptions to the enforceability of arbitration agreements. Congress has exercised that legislative prerogative when it believed it appropriate. Indeed, Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, itself provides that it does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The antitrust laws were already in force when the Federal Arbitration Act was enacted with its explicit exception for labor-related claims. The Committee Reports on the Act contain no reference to an exception for antitrust or other statutory claims. *See* S. Rep. No. 536, 68th Cong., 1st Sess. (1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924).

Congressional failure to exclude antitrust claims from the ambit of the Federal Arbitration Act, while excepting those other classes of claims, compels the inference that Congress did not intend an implied exception for arbitration of antitrust claims. In its recent decision in *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 103 S. Ct. 3369 (1983), this Court rejected the contention that additional implied exceptions to a broadly worded statute were intended by Congress where, as here, Congress had included specific exceptions in the statute itself.

> "The language of § 3701 encompasses 'every form of taxation,' and is inconsistent with implied exceptions. . . . From the specific exceptions for

> franchise and estate and inheritance taxes, and the conspicuous omission of shares taxes from that group, only one inference is possible: Congress meant to bar shares taxes to the extent they consider federal obligations in the computation of the tax."

463 U.S. at —, 103 S. Ct. at 3375 (citations omitted).

This Court has, of course, deferred to Congress when it has concluded that Congress had statutorily overridden the Federal Arbitration Act. Thus, in *Wilko* v. *Swan*, 346 U.S. 427 (1953), this Court held that pre-dispute agreements to arbitrate claims arising under the Securities Act of 1933 were unenforceable, because the Securities Act itself mandated such a result. 346 U.S. at 434-35. That is made clear from this Court's recent discussion of *Wilko* in *Southland*:

> "The question in *Wilko* was . . . whether Congress, in subsequently enacting the Securities Act, had in fact created . . . an exception [to § 2 of the Federal Arbitration Act]."

— U.S. at—n.11, 104 S. Ct. at 861 n.11. *Compare Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 512-514.

The judicial deference in *Wilko* to an expressed congressional policy of non-arbitrability for one class of claims does not provide authority for *ad hoc* judicial refusal to enforce arbitration agreements with respect to claims arising under other statutes whenever a court discerns some policy which it concludes would be better served by litigation. In *American Safety*, however, the Court of Appeals for the Second Circuit erroneously expanded the scope of *Wilko* in just such an impermissible manner. In refusing arbitration of a claim by a licensee that its license agreement was void on antitrust grounds, that court relied upon such factors as

the complexity of the legal and factual issues involved in antitrust matters, 391 F.2d at 827, the possible interest of the arbitrators in the outcome of litigation, *id.*, the importance of the antitrust laws in assuring a competitive marketplace, *id.* at 826, and the economic impact of large antitrust judgments, *id.* at 826-27. The court then "balanced" those factors against the clear language of the Federal Arbitration Act, and concluded that "the antitrust claims raised here are inappropriate for arbitration." *Id.* at 828.

It is for Congress, not the courts, to declare in any particular instance that arbitration of a class of claims shall not be permitted. As the Court of Appeals for the Fifth Circuit recently stated in declining to extend *Wilko* to a claim alleging fraudulent practices under the Commodity Exchange Act:

> "The more forceful argument against extending the *Wilko* rule to commodities cases is that it would require a judicial policy decision that Congress has not made. We must recollect that the Supreme Court in *Wilko* was not giving effect to its own determination that securities traders required special protections; rather it was effectuating a Congressional determination that had been embodied—implicitly at least—in the Securities Acts."

Smoky Greenhaw Cotton Co. v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 720 F.2d 1446, 1449 (5th Cir. 1983).

The Fifth Circuit's decision in *Smoky Greenhaw* represents the proper approach to determining whether claims under a federal statute are arbitrable. As *Southland* emphasizes, a court's proper role is to determine whether Congress exempted those claims from arbitration, not to determine for itself what it believed Congress should have

done. If Congress did not create such an exemption, the claims in question are arbitrable.

It is not necessarily true that congressional exclusions from the scope of the Arbitration Act are founded on the factors of "complexity" or "importance" that weighed so heavily in *American Safety*. For example, the Interstate Commerce Act provides that a person who ships his household goods may not be compelled to enter into a pre-dispute arbitration agreement with a motor carrier. 49 U.S.C. § 11711(b)(6) (Supp. 1984). On the other hand, Congress has expressly determined to allow arbitration of disputes over the validity of patents, which implicate unquestionably "important" statutes affecting the competitive marketplace. *See* 35 U.S.C. § 294.

Another example of congressional distinctions between arbitrable and non-arbitrable controversies is found in the fact that voluntary arbitration agreements between commodities brokers and their customers are made enforceable by statute, whereas municipal securities brokers may not enforce such arbitration agreements. *Compare* 7 U.S.C. § 21(b)(10) (Supp. 1984) *and* 17 C.F.R. § 180 *with* 15 U.S.C. § 78o-4(b)(2)(D). That distinction may well rest on a congressional determination that those who invest in municipal bonds are less sophisticated than those who speculate in commodities. The fact finding and policy choices which the legislature is empowered and equipped to make in establishing such distinctions are beyond judicial expertise and authority.

The Federal Arbitration Act does not exempt antitrust claims, nor does the Sherman Act contain an anti-arbitration provision. *Compare Southland*, — U.S. at — n.11, 104 S. Ct. at 861 n.11: "The question in *Wilko* was not whether a state legislature could create an exception to § 2

of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception." Congress has not seen fit to do for the Sherman Act what it did for the Securities Act and the other statutes and classes of claims referred to above. That being so, the courts are required to give effect to the plain language of the Federal Arbitration Act. *See, e.g., American Bank & Trust Co.* v. *Dallas County*, 463 U.S. at —, 103 S. Ct. at 3374, *quoting Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *American Safety* violates that cardinal doctrine, and should be disapproved.

B. *American Safety*'s Assumptions Regarding the Impact of Arbitration On Antitrust Enforcement Are Erroneous

American Safety's attempt to balance the policies behind antitrust enforcement against the express command of the Federal Arbitration Act is an impermissible usurpation of congressional power. Even if such judicial balancing were appropriate, however, the *American Safety* court erred in the balance which it struck.

The Second Circuit relied heavily upon this Court's decision in *Wilko* as support for its holding that, in light of "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases . . . the antitrust claims raised here are inappropriate for arbitration." 391 F.2d at 827-828.

As this Court made clear in *Southland*, it is incorrect to read *Wilko* as a warrant for judicial policymaking.

> "The question in *Wilko* was . . . whether *Congress*, in subsequently enacting the Securities Act, has in fact created . . . an exception [to § 2 of the Federal Arbitration Act]."

— U.S. at — n.11, 104 S. Ct. at 861 n.11 (emphasis added). Absent a congressionally created exception, § 2 of the Federal Arbitration Act must be enforced pursuant to its terms. *American Safety* is wholly inconsistent with that rule, and finds no support in *Wilko*.[10]

In the course of its analysis, the Second Circuit discussed four factors: (i) the role of the antitrust plaintiff as a "private attorney-general" who protects the public interest, 391 F.2d at 826-827; (ii) the possibility of the oppressive use of arbitration as the forum for trying antitrust violations through "contracts of adhesion between alleged monopolists and their customers," *id.* at 827; (iii) the inadequacy of the arbitral process to deal with the "complicated" issues and "extensive" evidence usual in antitrust cases, *id.;* and (iv) the inadvisability of allowing businessmen to decide issues under a law that is designed to regulate the business community, *id.* Those factors, singly or in combination, do not support the court's holding.

The *American Safety* "judicial exception" to arbitration of antitrust claims represents nothing less than an abdication

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[10] *See Saucy Susan Products, Inc.* v. *Allied Old English, Inc.*, 200 F. Supp. 724 (S.D.N.Y. 1961) (Feinberg, J.), holding that a trademark-related dispute was arbitrable. In reaching that holding, Judge Feinberg, the author of *American Safety*, observed that a claim under the Securities Exchange Act would not be arbitrable in view of 15 U.S.C. § 78g, which Judge Feinberg considered to be a provision barring waiver of judicial remedies. The trademark laws, in his view, were different. "There is no non-waiver provision in the Lanham Trademark Act . . . under which plaintiff's trademarks are registered, and it does not appear that an agreement to arbitrate future disputes would thwart Congressional policy." *Id.* at 728 (footnote and citation omitted). Thus, in *Saucy Susan*, Judge Feinberg correctly looked to see whether *Congress* had spoken to the question of arbitrability of the claims before the court. By contrast, *American Safety* did not rest its decision on congressional expression, relying instead on the court's "belief" as to congressional intent. 391 F.2d at 827.

of the federal judiciary's "obligation to shake off the old judicial hostility to arbitration." *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (Frank, *J.*). While purporting to acknowledge the primacy of arbitration, the Court of Appeals nonetheless held that some disputes are too important or complex to be entrusted to arbitrators. The Court of Appeals' opinion runs counter to the development of arbitration in this country, a development which this Court has encouraged.

The *American Safety* court first referred to the indisputable fact that antitrust claims can have broad-ranging public impact.[11] Based on that, the court, without citing any authority, stated that "[w]e do not believe that Congress intended such claims to be resolved elsewhere than in the courts." 391 F.2d at 827.

The perceived "importance" of a claim cannot be the determinant of whether it is arbitrable, because arbitrability then becomes the province of every court's *ad hoc* decision that the claim in issue is, or is not, "important" enough to require judicial resolution. That approach admits of no limiting principle, and the lower courts should not be permitted to engage in such efforts to determine whether a particular statutory claim is "important" enough or of sufficient "stature" to defeat the clear congressional policy expressed in the Federal Arbitration Act. *American Safety*,

[11] It is significant, however, that the antitrust claims most likely to be subject to an arbitration agreement are those which arise out of contractual relationships which are, within the meaning of the antitrust laws, "vertical" in nature. *See Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Such claims are unlikely to "affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage." *American Safety*, 391 F.2d at 826. By contrast, there is no likelihood that a victim of a "horizontal" price-fixing conspiracy would be contractually obligated to arbitrate his antitrust claims against all the conspirators.

however, invites just such judicial usurpation of the legislative function.

The lower federal courts have reached hopelessly inconsistent results in attempting to apply *American Safety* to claims based upon other statutes. One example of the confusion and uncertainty generated by *American Safety* is found in judicial treatment of agreements to arbitrate claims arising under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* ("CEA"). Several district courts have held that claims arising under that statute are non-arbitrable, relying on their respective determinations that the policies behind the CEA outweigh those of the Federal Arbitration Act. *See Breyer* v. *First National Monetary Corp.*, 548 F. Supp. 955 (D. N.J. 1982); *Milani* v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405 (N.D. Cal. 1976). Other courts, however, have rejected that contention. *Smoky Greenhaw Cotton Co.* v. *Merrill Lynch Pierce Fenner & Smith, Inc.*, 720 F.2d at 1449; *Ingbar* v. *Drexel Burnham Lambert, Inc.*, 683 F.2d 603, 605 (1st Cir. 1982). *See Marchese* v. *Shearson Hayden Stone Inc.*, 734 F.2d 414 (9th Cir. 1984).

Similarly, the lower courts are split on the question of the arbitrability, under *American Safety*, of claims arising under the Employees Retirement Income Security Act ("ERISA"). For example, in *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977), the district court held that claims arising under ERISA were not arbitrable, in large part because "important federal legislation of the stature of ERISA has been held inappropriate for arbitration." *Id.* at 277. *American Safety* and the line of cases which relied on it were cited in support of that proposition. *Id.* In *Fox* v. *Merrill Lynch & Co.*, 453 F. Supp. 561 (S.D.N.Y. 1978), on the other hand, the district court concluded that ERISA was of lesser public importance than the antitrust laws, and referred a claim

arising under ERISA to arbitration. *Id.* at 566. *See Michota* v. *Anheuser-Busch, Inc.*, 526 F. Supp. 299, 321 (D. N.J. 1980), *modified on other grounds sub nom. Adams* v. *New Jersey Brewery Employees Trust Fund*, 670 F.2d 387 (3d Cir. 1982).

The second factor discussed in *American Safety* is that "contracts of adhesion between alleged monopolists and their customers" should not, in the court's words, "determine the forum for trying antitrust violations." 391 F.2d at 827. While that proposition, standing alone, is unobjectionable, there is no proof at all that arbitration agreements are, as a rule, set forth in "contracts of adhesion." Indeed, in this action, while MMC sought and obtained an arbitration agreement with SCP in the Sales Procedure Agreement (JA 52-53), CISA did not do so in its Distributor Agreement with SCP (*see* JA 18-41), or in the Sales Procedure Agreement, to which it is also a party. Moreover, if a particular arbitration agreement were a contract of adhesion, it would be invalid for all purposes, and not merely with respect to antitrust claims, inasmuch as a contract of adhesion is subject to revocation on "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. *See Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).[12]

The third *American Safety* factor is that, because in antitrust cases the issues may be complicated and the evidence tends to be extensive, they are "far better suited to judicial than to arbitration procedures." 391 F.2d at 827. That view of the arbitral process is at best inaccurate and

[12] The "contract of adhesion" contention appears not to have been raised by the parties before the district court in *American Safety*. *See American Safety Equipment Corp.* v. *Hickok Mfg. Co.*, 271 F. Supp. 961 (S.D.N.Y. 1967) (staying actions and compelling arbitration of all claims), *remanded*, 391 F.2d 821 (2d Cir. 1968).

at worst demeaning. First, numerous complex commercial cases, far more difficult and involved than the dealer termination claims typical of actions in which *American Safety* is invoked, have routinely been referred to arbitration.[13] Second, there is a growing body of authority for the proposition that certain antitrust claims are too complex for jury determination. *See In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (Seitz, *Ch. J.*). Finally, an agreement to submit an antitrust case to arbitrators will be enforced if the agreement is made after the dispute has arisen, despite the undiminished "complexity" of the action. *See Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1970).

The final factor listed in *American Safety* is an assertion that, because business is regulated by the antitrust laws, and arbitrators often are businessmen, "it hardly seems proper for them to determine these issues of great public interest." 391 F.2d at 827. The same statement could be made with respect to arbitration of claims arising under any statute. Moreover, the *American Safety* court offered no support for that proposition with respect to antitrust claims.

Most commercial arbitration is conducted pursuant to the rules and under the auspices of organizations such as the American Arbitration Association and the International Chamber of Commerce. Typically the parties select their own arbitrators, but they frequently are assisted by those

[13] For example in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court, in rejecting an argument that a fraud claim was not arbitrable, observed that "no claim is made that Prima Paint ever intended that 'legal' issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract." 388 U.S. at 406. The antitrust claim in this case, like the fraudulent inducement claim in *Prima Paint*, is a "legal issue[ ] relating to the contract."

organizations. Thus, the sophistication, background and experience of arbitrators is largely within the control of the parties, and is likely to be at least equal to that of the average federal court jury, particularly when dealing with the complex economic and business facts which are the hallmark of difficult antitrust cases.

For example, the arbitral tribunal selected by the parties and the JCAA in the dispute between MMC and SCP consists of three eminent Japanese lawyers: the former dean of the faculty of law of the University of Tokyo (the chairman of the tribunal); a former Japanese district court judge;[14] and an international lawyer and scholar who studied law in the United States and has written and published works on distribution agreements and the competition laws of Japan and the United States.

It is evident that there was and is no basis for the Second Circuit's assumption that antitrust enforcement would be seriously impaired by having some private antitrust claims decided by arbitration. *American Safety* is unsupportable even on its own terms, and should be disapproved. The Court of Appeals' holding in this action, which relies upon *American Safety*, is similarly untenable.

C. *American Safety* Encourages Misuse of the Antitrust Laws and the Courts in Order to Accomplish Collateral Goals

The cases in which arbitration agreements will be applied to asserted antitrust claims arise out of private business relationships, like those at issue in *American Safety* and in this case. If one examines the facts of *American*

[14] In Japan, the district court is the trial court of general jurisdiction.

Safety and its progeny,[15] as well as the facts of this case, it appears that the lower courts' solicitude for these antitrust claimants is, at best, misplaced.

In *American Safety*, plaintiff American Safety filed an action seeking a declaratory judgment that a license agreement, pursuant to which it manufactured goods using the defendants' trademarks, was void under the antitrust laws and that, therefore, the agreement's royalty payment provisions were unenforceable. Twelve days later, the assignee of the defendant licensor demanded arbitration to recover $321,000.25 in royalties owed by American Safety. American Safety responded with another lawsuit, seeking declaratory relief and a permanent injunction against the arbitration. *See* 391 F.2d at 823. Following what the Court of Appeals described as a "procedural morass," *id.*, the district court stayed both actions and compelled arbitration of all claims. *Id.* The Second Circuit remanded, as discussed above.

Cobb v. *Lewis* arose out of a breach by movie theatre franchisees of their franchise obligations. The franchisor promptly demanded arbitration of its claims arising out of those breaches. 488 F.2d at 43. The franchisees appeared in the arbitration and sought and obtained an extension of time to respond. The franchisees filed an answer and counterclaim in the arbitration alleging fraud, failure of consideration, breach of contract and securities law and antitrust violations, and requested appointment of an arbitral panel. *Id.* They then abruptly withdrew from the arbitration and filed a class action in federal court, alleging substantially the same claims as those previously asserted as counterclaims in the arbitration. The franchisor moved to stay the suit pending completion of the arbitration. The

[15] *See* footnote 9, *supra*.

district court granted defendant's motion. *Id.* at 44. The Fifth Circuit reversed and remanded, relying upon *American Safety*. *Id.* at 47.

In *Helfenbein* v. *International Industries, Inc.*, the defendant, a franchisor, had commenced an eviction proceeding against plaintiffs, its franchisees. 438 F.2d at 1070. The franchisor also had demanded arbitration of claims for goods and services which it had previously furnished to the franchisees, but for which payment had not been made. In response, the franchisees filed an antitrust action and sought a preliminary injunction against the arbitration and the eviction proceeding. *Id.* The district court denied the application, and the Eighth Circuit affirmed. Though noting its view that the arbitrators could not pass upon the substance of the antitrust claims (citing *American Safety*), the Eighth Circuit saw no basis for granting a preliminary injunction. *Id.* In its order denying rehearing, the court observed that it was "obvious" that the plaintiffs had used the alleged tying violation by the franchisor as an excuse to avoid payment for the goods and services then being sought in the arbitration. *See id.* at 1072.

Similarly, in this case, MMC sued SCP primarily to recover damages for nearly one thousand automobiles ordered but not paid for by SCP. SCP responded, in now-typical fashion, with an antitrust counterclaim, challenging an alleged vertical territorial restriction, *see* 723 F.2d at 160, which the District Court has since described as "lacking in substance." The District Court properly ordered arbitration of that counterclaim. The Court of Appeals, however, followed *American Safety* and barred that arbitration.

American Safety and its progeny have made it possible for unscrupulous businessmen to enlist the courts and the antitrust laws, not only to repudiate unquestionable commercial obligations, but to thwart the dispute resolution mechanism which Congress has made available and to which those businessmen had freely consented.

The result below is also harmful to judicial administration. First, the existing judicially created exceptions to arbitration encourage parties to arbitration agreements to manufacture claims under those exempted statutes in an effort to avoid arbitration. Such procedural maneuvering clogs the dockets of the lower courts and coerces unjustified settlements from parties which had sought to limit such time and expense by entering into arbitration agreements.[16] That concern is particularly acute with respect to the antitrust laws, where proceedings are protracted and expensive, and disposition short of a plenary trial is difficult to obtain. *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472-73 (1962).

Moreover, by leaving open the possibility of further exceptions to the Federal Arbitration Act, the decision below will encourage precisely the sort of legal maneuvering and pre-arbitration litigation which Congress sought to avoid:

> "[I]n passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we

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[16] In *Standard Chlorine of Delaware, Inc.* v. *Leonard*, 384 F.2d 304 (2d Cir. 1967), the Court of Appeals, upon an attempted appeal from an order compelling arbitration of claims pleaded in a complaint "drawn with the objective of avoiding arbitration," *id.* at 306, stated:

> "Arbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration."

Id. at 305.

> not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

Prima Paint, 388 U.S. at 404. The Court recently reaffirmed that "Congress' clear intent, in the Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 (1983). The *American Safety* doctrine, which constitutes an unauthorized reversion to the common-law hostility to arbitration, is fundamentally at odds with that congressional intent.

Cases such as this can and should be decided by the arbitrators selected by the parties who chose that mode of settling their disputes. Moreover, such arbitration is typically in the best interest of all businessmen, except those who are attempting to protract and prolong the process to avoid any decision at all. The virtues of avoiding the unnecessary expense and delay of litigation, appealing "to big business and little business alike," are set forth in the Senate Report on the Federal Arbitration Act:

> "It has been said that 'arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society.' The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals."

S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).

The delay, uncertainty and expense created by the *American Safety* approach is well illustrated by the Ninth Circuit's recent decision in *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414 (9th Cir. 1984). In that case, the plaintiff, an experienced commodities investor, had entered into a separate arbitration agreement with his broker which specifically stated, in conformity with statutory and regulatory requirements, that it was voluntary and was not required in order to open an account. 734 F.2d at 416 n.2. In 1978, the plaintiff filed a declaratory judgment action under Section 4d of the CEA, 7 U.S.C. § 6d, alleging that the broker was retaining "increment and interest" on his funds beyond the level permitted by law. *Id.* at 417. The district court stayed that action and referred the dispute to arbitration.

In 1979, plaintiff filed a separate action, alleging that the defendant had violated the CEA. That claim was dismissed by the district court on grounds that there was no implied right of action under the CEA. *Id.* Undeterred, the plaintiff amended his complaint to allege a breach of fiduciary duty by the broker in the management of his account. That action, too, was stayed and referred to arbitration. *Id.*

In 1983, the arbitration panel to which the claims were referred dismissed all of plaintiff's claims. The district court confirmed that decision and entered a judgment against the plaintiff.

On appeal, the Court of Appeals first set forth the standard it would apply. Citing *American Safety*, it stated that:

> " 'non-waivable statutory rights' . . . are best left to judicial interpretation. Essentially, courts have engaged in a 'balancing process' to determine which statutory rights should be left to the judiciary to

> interpret and apply. . . . We agree with Shearson that arbitrators, in appropriate cases, may decide questions of law. . . . In some situations, however, it has been determined that for policy reasons the balance as a matter of law weighs against arbitration of certain disputes. . . . We have not foreclosed the possibility that in other situations the balance may swing in favor of arbitration if there is an express provision, fairly bargained for, that provides for arbitration of the statutory question. . . . It is up to case-by-case interpretation to determine which statutes are such that an arbitrator can consider the statutory claim."

Id. at 420 (citations omitted).

Applying that "case-by-case" approach, the court held that the claim under Section 4d was non-arbitrable because it was a matter of first impression, but indicated that future claims based on that statutory provision might be arbitrable. *Id.* at 421. As to the claim of breach of fiduciary duty, the court reached the opposite conclusion, and held that the reference to arbitration was appropriate. *Id.* at 423.

Marchese, which utilized a "balancing" approach to override the express congressional approval of agreements to arbitrate disputes arising under the CEA set forth in 7 U.S.C. § 7a(11) (Supp. 1984), is a natural development of *American Safety*. By granting to themselves the right to "balance" the "importance" of various statutory claims against the express command of the Federal Arbitration Act, the lower courts have undermined "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. Instead, the line of cases proceeding from *American Safety* to *Marchese* and to this case have clogged

the lower courts with years of complex procedural maneuvering, often turning on contrived claims asserted solely to defeat arbitration and avoid payment of just claims. This Court should reject *American Safety*. The judgment of the Court of Appeals, which relies upon that decision, should be reversed.

II.

The Court of Appeals Declined to Enforce a Treaty of the United States

The conflict between the Federal Arbitration Act and the *American Safety* doctrine requires the latter to yield. That being so, the Court of Appeals' judgment in this case should be reversed. If, however, the *American Safety* doctrine were to be deemed a valid bar to arbitration of antitrust claims relating to domestic American commercial transactions, the judgment of the Court of Appeals should still be reversed in this case. That is because the court below, in an unprecedented and impermissible leap, extended the *American Safety* doctrine to bar arbitration of an antitrust claim relating to an international commercial transaction.

Interpretation of the Convention must begin with the language of the treaty itself. If that language constitutes a clear expression of the political branches' exercise of their power under the commerce, treaty and foreign relations clauses, then the role of the courts is to effectuate that determination, and not to review or "balance" it.

In *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, — U.S. —, 104 S. Ct. 1776 (1984), this Court rejected a challenge to a provision of the Warsaw Convention which, as implemented, restricted an airline's liability for lost cargo to $9.07 per pound. *See* — U.S. at —, 104 S. Ct. at 1779.

The plaintiff in that action had entrusted $250,000 in coins to the defendant, who lost them in transit. Even though the sum of $9.07 was derived from the relationship between the French franc and the price of gold over 50 years ago, and unquestioned evidence was presented of "a substantial change in conditions," including a radical rise in the price of gold, — U.S. at —, 104 S. Ct. at 1781-1784, the Court deferred to the determination of Congress and the Executive branch, and enforced the terms of the treaty as written.

In reversing the decision of the Court of Appeals invalidating the treaty, the Court observed that:

> "The political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that they wish to do so. Accordingly, the Convention's cargo liability limit remains enforceable in the United States."

— U.S. at —, 104 S.Ct. at 1787. Here, application of *American Safety*'s "balancing" test to claims concededly within the scope of the Convention was a similarly unwarranted invasion of the prerogatives of the political branches, and should likewise be reversed.

A. The Language of the Convention Mandates Arbitration

The provisions of the Convention which govern the recognition and enforcement of arbitration agreements, set forth in the margin,[17] are unequivocal and do not allow for the exception created by the Court of Appeals.

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[17] Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen . . . between them

(footnote continued on following page)

The Court of Appeals began its analysis of the Convention by correctly construing Article II(3), which bars enforcement of any arbitration clause which is "null and void, inoperative or incapable of being performed." Quoting from its earlier decision in *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982), the court reiterated that Article II(3) can "encompass only those situations—such as fraud, mistake, duress, and waiver—*that can be applied neutrally on an international scale*." 723 F.2d at 164 (emphasis supplied).

The Court of Appeals' analysis, however, broke down at the next step, where the requirement of Article II(1) that the arbitration agreement concern "a subject matter capable of settlement by arbitration," comes into play. The Court of Appeals held that, in light of the *American Safety* doctrine, an agreement to arbitrate antitrust claims is not "an agreement within the meaning of" Article II(3) of the Convention, because such an agreement allegedly does not concern a "subject matter capable of settlement by arbitration", as required by Article II(1). *Id.* at 166. The Court of Appeals' conclusion is in error.

The critical step taken by the Court of Appeals in arriving at its erroneous conclusion is found in its statement that "capable of settlement by arbitration" implies that the Convention provides another basis for refusing arbitration "absent fraud, mistake, duress, and waiver and absent

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(footnote continued from preceding page)

> in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> . . . .
>
> 3. The Court of a Contracting State . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

something shocking to the sensibilities of a nation's public policy." *Id.* at 164. If that is not so, said the court, "then the Convention's words 'capable of settlement by arbitration' have no meaning at all." *Id.* at 165.[18]

Having accepted the proposition that it was empowered to determine independently whether a claim is arbitrable or not, the Court of Appeals then attempted to identify and balance what it perceived as the various policies at stake to determine whether or not to extend *American*

[18] The Court of Appeals professed to see a "hiatus" between Article II of the Convention, which deals with enforcement of arbitration agreements, and Article V, which deals with enforcement of arbitration awards. 723 F.2d at 164 & n.9. That "hiatus" is, in reality, nothing more than a reflection of the way in which both articles became part of the Convention, and how they coexist.

The 1958 Conference which drafted the Convention originally focused exclusively upon the question of enforcement of arbitration awards. It was not until the last day of the Conference that Article II was added. *See* Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,"* 13 INT'L LAW. 269, 278 (1979). What is now Article V had been the principal focus of the drafters of the Convention up to that point. *Id.*

Within Article V(2) itself, it is "generally accepted" that the "subject matter" provision of Article V(2)(a) is subsumed within the "public policy" provision of Article V(2)(b). A. Jan van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958, 360, 368 (1981), and that the two separate provisions were included in Article V of the Convention only to be consistent with earlier arbitration treaties. *Id.* Indeed, there was concern at the time the Convention was drafted that the "public policy" provision of Article V(2)(b) might be misconstrued by judges to apply the domestic policies of their respective countries to thwart international arbitration agreements. *See* G. W. Haight, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE 66 (1958). By 1981, however, one noted commentator reported that such concern had "turned out to be unwarranted . . . the courts generally use the distinction between domestic and international public policy," thus obviating "undersirable consequences." van den Berg, *supra,* at 368-369.

Safety to the international arena. The court assumed its own conclusion by describing the *American Safety* doctrine as a "subject matter oriented, deep seated rejection of the arbitral process." *Id* at 165. It follows, said the court, that antitrust claims are not "capable of settlement by arbitration" within the meaning of Article II(1).

The words "capable of settlement by arbitration" found in Article II(1) do, of course, have meaning, but not the meaning ascribed to them by the Court of Appeals. In *Scherk,* 417 U.S. at 520 n.15, this Court quoted Article II(1), and explained that:

> "In their discussion of this Article, the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements."

Id. (citation omitted). Thus, this Court foresaw in *Scherk* the possibility which has come to pass in this case: that the courts of one country, here the United States, would "decline enforcement of [arbitration] agreements upon the basis of parochial views" of the suitability *vel non* of arbitrating antitrust claims, or any other type of claims. *Scherk* is inconsistent with such a course, because *Scherk* is faithful to the proposition that Congress, by ratifying and implementing the Convention, has made its own policy choice respecting international arbitration, a choice which the courts must honor.

By, in effect, rewriting the Convention through its expansive and unwarranted construction of Article II(1), the court below abandoned its proper role in treaty interpretation. The Court of Appeals stated:

> "We doubt that other nations are ignorant of the primacy we accord to antitrust law. . . . In any event, whether or not other nations agree with United States law and attitudes relating to competition, it is extremely doubtful that they would describe them as 'parochial' in the sense of being petty provincialisms."

723 F.2d at 163. The Court of Appeals thus elevated the judge-made and domestically applied *American Safety* doctrine over the internationally applied Convention, as negotiated by the Executive, ratified by the Senate and implemented by Congress. The court went so far as to conclude that as long as other nations were informed about "the primacy we accord to antitrust law," it is wholly irrelevant whether "other nations agree with United States law and attitudes." Despite the court's protestations to the contrary, that is nothing more than the parochialism which it purported to eschew.[19]

B. The Decision of the Court of Appeals Will Subvert the Goals of the Convention

In *Scherk*, this Court eliminated any doubt as to the goals the Convention was meant to serve:

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

417 U.S. at 520 n.15 (citations omitted).

As with any treaty, the Convention is to be liberally construed in order to effectuate those stated goals. As the Court noted in *Bacardi Corporation of America* v. *Domenech*, 311 U.S. 150, 163 (1940), "[a]ccording to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it."

The Court of Appeals in this case engaged in precisely the wrong analysis of the Convention. Rather than seeking to act in accordance with the law of nations and the policy expressed in the Convention itself by the political branches, it acted in accordance with its own notions of the relationship between domestic antitrust disputes and arbitration. Instead of acting so as "to unify the standards by which agreements to arbitrate are observed," *Scherk*, 417 U.S. at 520 n.15, it decided the case in a manner likely to cause disunity among nations concerning the enforcement of arbitration agreements.[20]

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[19] Contrary to the Court of Appeals' conclusion, an antitrust claim certainly is "a subject matter capable of settlement by arbitration." Indeed, the same court which decided *American Safety* also decided *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), *cert. denied*, 406 U.S. 949 (1970), in which it was held that a post-dispute arbitration agreement relating to an antitrust claim would be enforced.

[20] Discord already exists between the United States and many of its closest allies, including England, Canada, France, Australia and the Netherlands, over the extraterritorial reach of American antitrust litigation. A number of those other nations have enacted protective or retaliatory legislation against such application of American law to conduct by foreign nationals. *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 LOYOLA L. REV. 213 (1982); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585 (1981).

The Court of Appeals' decision in this case represents a further American invasion of the world of international commerce, in insisting that, regardless of the assent of the United States to a multilateral agreement to resolve disputes by arbitration, American courts will negate that accord in favor of what they perceive to be a counter-

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The Court of Appeals thus disregarded this Court's recognition of why Congress ratified the Convention and enacted it into positive law by adopting Chapter Two of the Federal Arbitration Act. In *Scherk*, the Court stated:

> "[W]e think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today."

417 U.S. at 520 n.15.

The Court of Appeals failed to defer to the "congressional policy" expressed in the Convention and the Federal Arbitration Act, and instead reached its own conclusion as to the arbitrability of the antitrust dispute in this case. It had neither the authority nor the resources to perform that task.

C. The Legislative History of the Convention Lends No Support to the Holding of the Court Below

In the course of the Convention's adoption by the United States, the State Department submitted a memorandum advocating its ratification to the Senate, which stated in part that:

> "The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the Union, for example, disputes affecting title to real property are not arbitrable."

S. Exec. Doc. E, 90th Cong. 2d Sess. 19 (1968); *see also* S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 9 (1968). The

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(footnote continued from preceding page)

vailing American policy of sufficient stature. Such judicial intrusion into the realm of international relations has effects precisely opposite to the goals of the Convention.

key reference in the memorandum is to "laws in force in many countries." That reference indicates that, as in the domestic context discussed in Point I, *supra*, it is for the legislature in any given instance to determine what is, or is not, "a subject matter capable of settlement by arbitration." That is consistent with this Court's teaching in *Wilko*, as *Southland* recently made clear, — U.S. at — n.11, 104 S. Ct. at 861 n.11. Courts should not be permitted to re-evaluate the wisdom of a treaty negotiated by the Executive, approved by the Senate and implemented by Congress, because the policy balance already has been weighed and struck. The Court of Appeals disregarded its proper role under the Convention, and its holding should therefore be reversed.

III.

The Court of Appeals Failed to Follow This Court's Prior Decisions in *Scherk* and *The Bremen*

The fact that international commercial disputes are involved in this action necessarily restricts judicial intervention in the arbitral process to a degree even greater than would be the case in a purely domestic setting. For example, although this Court held in *Wilko* that a domestic action under the Securities Act is not subject to arbitration, an agreement to submit to arbitration a securities dispute arising out of international commerce must be enforced by an American court. As the Court explained in *Scherk*:

> "[T]he respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement.
>
> . . . .

"A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

. . . .

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'

"For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act."

417 U.S. at 515-520 (citations and footnotes omitted).

There is nothing in *Scherk* which would limit its holding to securities actions. It necessarily follows that the non-statutory policy of *American Safety*, which is derived largely from the Second Circuit's reading of *Wilko*, see 391 F.2d at 825-26, is likewise inapplicable in an international setting. As *Scherk* itself recognized, that conclusion is confirmed by the ratification of the Convention and passage of Chapter Two of the Federal Arbitration Act. *See* 417 U.S. at 520 n.15.

American law must co-exist with the differing procedural and substantive law of other nations. As in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which upheld the enforceability of a forum-selection clause requiring that disputes arising out of an international transaction be brought only before a specified English court:

> "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

Id. at 9.

Similarly, in *Scherk* the Court noted that the international contract at issue there "involve[d] considerations and policies significantly different from those found controlling in *Wilko*." 417 U.S. at 515. Because *Scherk* involved a transaction with significant contacts in several countries, absent the agreement which this Court enforced, there would have been no clear answer to the question of where an action between the parties could be brought. In such "truly international" transactions:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."

417 U.S. at 516.

In *Scherk*, this Court applied the teaching of *The Bremen* to a case involving a claim asserted under federal securities law by one party to an international arbitration agreement. The district court and Seventh Circuit had denied a motion to compel arbitration, relying upon this Court's decision in

Wilko. This Court reversed, explaining that an "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S. at 519. It found the lower courts' reliance on the domestic policy of non-arbitrability of securities law disputes established by *Wilko* to be inapposite in light of the "significant and . . . crucial differences" between a domestic and a "truly international agreement." *Id.* at 515.

In its opinion in this case, the Court of Appeals advanced several bases for its conclusion that arbitration of antitrust claims arising out of international commerce was improper. The court's assertions lack substance.

The Court of Appeals first asserted that to recognize arbitration agreements in international contracts would be the equivalent of granting suppliers and sellers "insulation" from the antitrust laws. 723 F.2d at 163. The Court of Appeals further asserted that this "immunity" would be available to all but the "most minor and insignificant of business dealings" by "the simple expedient of [American companies] co-opting some foreign or international entity into the arrangement" as "partners, suppliers, or financers." *Id.*

The blanket of immunity envisioned by the court below simply does not exist. An arbitration agreement does not provide any party with "insulation" from antitrust claims, but assures that any such dispute will be prosecuted in a forum which provides a prompt and inexpensive resolution of those claims.

Nor is there any basis to believe that American courts are incapable of separating true from sham international

contracts, in a manner similar to that required in numerous other legal contexts where substance, and not form, is controlling. Moreover, the record in this case indicates that the fears of the Court of Appeals lack a factual basis. The arbitration requested is solely between SCP and MMC. However, SCP's antitrust counterclaim also names both Chrysler and CISA as members of the alleged conspiracy with MMC to prevent SCP from transhipping vehicles to the continental United States.[21] There is no contract between Chrysler and SCP and, although CISA is a Swiss corporation whose business is truly international, neither of the two agreements to which SCP and CISA are parties contains an arbitration clause applicable to them.

The Court of Appeals also placed great weight, in its attempt to distinguish the otherwise controlling effect of *Scherk*, on its view that "different policies [were] at issue." 723 F.2d at 168. Indeed, the court below saw the purportedly different policies underlying the securities laws as "[p]erhaps the major difference between *Scherk* and the case at hand." *Id.* The court viewed *Scherk* as requiring a "balancing test," weighing the policy considerations supporting arbitration against the values expressed in the securities laws or antitrust laws.[22] *Id.*

Even by the terms of its own analysis, the court below failed to perform the required task. Under its reading of *Scherk*, the court should have balanced the public policy

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[21] CISA is presently a defendant on SCP's antitrust counterclaim; the District Court has not yet ruled on a motion by SCP seeking leave to amend its pleading to add Chrysler as a counterclaim-defendant.

[22] The court phrased the test as follows: "we must weigh the private party's interest in the arbitration of international contract disputes against the public's interest in the preservation of economic order in the United States." 723 F.2d at 168.

underlying the antitrust laws against the policy in favor of arbitration in international commercial transactions. Instead, the court weighed the securities laws against the antitrust laws in order to resolve the false issue of which was more important. *Id.* at 168.

Although acknowledging that by bringing an action under the securities laws the investor "serves the public interest by policing the securities market," the court ultimately concluded that the antitrust laws are of greater public importance. Quoting from *American Safety*, the court said:

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."

Id. at 168. The court contrasted that to its view that "the securities laws are designed primarily to protect a fairly small 'special interest' group: those investors in a particular security who read and are influenced by information in the company's prospectuses or financial reports." *Id.*

The court's analysis is contrary to the decisions of this Court. The Court stated in *United States* v. *Naftalin*, 441 U.S. 768 (1979):

> "[N]either this Court nor Congress has ever suggested that investor protection was the sole purpose of the Securities Act. As we have noted heretofore, the Act 'emerged as part of the aftermath of the market crash in 1929' . . . .
>
> "Indeed, Congress' primary contemplation was that regulation of the securities markets might help set the economy on the road to recovery. . . .

> Prevention of frauds against investors was surely a key part of that program, but so was the effort 'to achieve a high standard of business ethics . . . in every facet of the securities industry. . . .'
>
> "This conclusion is amply supported by reference to the legislative record. The breadth of Congress' purpose is most clearly demonstrated by the Senate Report. . . . While investor protection was a constant preoccupation of the legislators, the record is also replete with references to the desire to protect ethical businessmen. . . . Respondent's assertion that Congress' concern was limited to investors is thus manifestly inconsistent with the legislative history.
>
> "Moreover, the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole."

Id. at 775-776 (citations and emphasis in original omitted).

In any event, the Convention does not contemplate a sliding scale of statutes, with those considered "unimportant" or "merely private" the only ones appropriate for arbitration. The supposed battle between the antitrust and securities laws upon which the Court of Appeals based its conclusion is, therefore, a false conflict. As *Scherk*, which compelled arbitration of disputes under critical federal legislation made clear, all claims, whether statutory or not, arising out of an international commercial transaction are subject to a valid agreement to arbitrate, absent a congressional determination to the contrary.

In this case, the refusal to honor the arbitration agreement would "not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial

concept that all disputes must be resolved under our laws and in our courts.'" 417 U.S. at 519. This would be precisely the assertion of "primacy of United States law over the laws of other countries" that this Court condemned in *Scherk* as unnecessarily "demean[ing] the standards of justice elsewhere in the world." *Id.* at 517 n.11.

Foreign companies doing business with American businesses will be justifiably concerned if, notwithstanding a mutual agreement to arbitrate disputes, they could find themselves embroiled in litigation. *Scherk* warns that such uncertainty may "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S. at 517 (footnote omitted). Because, as *Scherk* observes, an arbitration agreement or forum selection clause is "an almost indispensable precondition" to any international business transaction, *id.* at 516, such provisions should be respected and enforced.

Conclusion

The judgment of the Court of Appeals, insofar as it reversed the judgment of the District Court, should be reversed, with directions that the judgment of the District Court be reinstated.

December 17, 1984

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BRIEF

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IN THE

Supreme Court of the United States

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v.

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent.

SOLER CHRYSLER-PLYMOUTH, INC.,
Petitioner,

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF SOLER CHRYSLER-PLYMOUTH, INC.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF SOLER CHRYSLER-PLYMOUTH

STATEMENT OF INTEREST

The National Automobile Dealers Association ("NADA") is a nonprofit corporation organized and existing under the laws of the State of Delaware with its principal office at 8400 Westpark Drive, McLean, Virginia 22102. NADA represents in excess of 19,000

franchised new car and truck dealers throughout the United States. More than a third of the automobile dealers in the Commonwealth of Puerto Rico are associate members of NADA. NADA members represent all domestic automotive manufacturer-franchisors, including General Motors Corp., American Motors Corp., Ford Motor Co. and Chrysler Corp., and foreign manufacturers, including Mitsubishi Motors Corp., who distribute in the United States.

One of the purposes of NADA, as set forth in its Certificate of Incorporation, is to represent and act on behalf of its dealer membership "to promote model laws and the enactment of such legislation as will benefit the trade and the public, recognizing the principle of self-determination in each state."

NADA was a significant force behind the initial passage of the Dealer's Day In Court Act ("the Act") and has continually monitored its enforcement. Any determination that an automobile dealer cannot obtain judicial review under the Act is of obvious and great significance to all NADA members.

SUMMARY OF ARGUMENT

The First Circuit found that to the extent that the conduct at issue falls within the scope of an arbitration clause in an agreement between an automobile dealer and manufacturer, the dealer is not entitled to judicial consideration of such conduct pursuant to the Act. Instead, such claims are subject to arbitration under the Federal Arbitration Act. This determination is based upon a fundamental misunderstanding of current case law which holds that arbitration clauses are not binding where federal statutes are designed to remedy disparities in bargaining positions or to foster important national policies and interests.

In this instance, the Act was passed to remedy the disparity in bargaining power between automobile manufacturers and dealers. As a result of that disparity, dealers have never been able to negotiate contracts to protect fully their own interests. The Act provides an absolute right of federal court review of allegations of a manufacturer's bad faith regardless of the existence of any contractual rights or obligations.

If the circuit court's opinion is allowed to stand, manufacturers, by the use of the same disparity in bargaining power which Congress has condemned, could impose mandatory arbitration clauses in all franchise agreements. Manufacturers would thus be effectively repealing the very protection which the Act created.

In addition, the Act is part of a broad, evolutionary antitrust program, serving important national interests affecting a broad portion of the economy. Like claims under the antitrust laws, claims under the Act should not be made subject to arbitration.

Finally, where statutory rights generally have been created by Congress to offset disparities in bargaining positions, courts have been reluctant to apply the Federal Arbitration Act to eliminate such statutory rights.

ARGUMENT

I. The Congressional Purposes Underlying The Dealers' Day In Court Act Are Nullified By The Application Of The Federal Arbitration Act.

In its opinion, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 169 (1st Cir.

EDITOR'S NOTE

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1983), the First Circuit reversed a lower court ruling that had required the submission of antitrust claims to arbitration. The district court, relying on *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), had found the antitrust claims arbitrable because they arose in the context of an international transaction. The court of appeals, however, affirmed the portion of the district court's judgment which had found that certain allegations [1] under the Act must be submitted to arbitration, pursuant to the contract between the parties. 723 F.2d 161, 169. The district court had stated that

> Unlike claims under the antitrust laws, claims involving automobile dealer's termination do not significantly involve the public interest. Thus, we find that since the antitrust claims herein, given their international nature are arbitrable, the Dealer-Day-In-Court Act claims (which are based on the same allegations), are arbitrable as well.

The court of appeals stated with respect to Soler's claim of coercion by Mitsubishi:

> It essentially restates allegations made in claims under the Puerto Rican Dealers' Act and the Sherman Act. It is sufficiently related to covered articles of the sales procedure agreement to trigger the arbitration clause.

[1] Soler Chrysler-Plymouth, Inc. ("Soler") had made two allegations under the Dealers' Day In Court Act. The district court found that Soler's allegation that Mitsubishi Motor Corp. ("Mitsubishi") had acted in bad faith in establishing minimum sales volumes for Soler was outside the scope of the arbitration clause. Another allegation, that Mitsubishi attempted to coerce and intimidate Soler into accepting a proposal whereby Mitsubishi would replace Soler with its own wholly-owned subsidiary, was found to be within the scope of the arbitration clause. 723 F.2d at 161.

723 F.2d at 161. The First Circuit subsequently held that while the Sherman Act claims were within the scope of the arbitration clause, they were "nonarbitrable" under the antitrust exception to arbitrability, *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1981). The court, however, did not include the Dealers' Day In Court Act claims in its reversal. This portion of the decision wholly defeats the Congressional purpose and intent underlying passage of the Act.

As this Court stated in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100 (1978), the Act was passed to remedy "[t]he disparity in bargaining power between automobile manufacturers and their dealers . . . ." In 1956, Congress found that

> [c]oncentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. Investigations of the automobile industry, moreover, demonstrate a continuing trend toward greater concentration, as well as abuse by the manufacturers of their dominant position with respect to their dealers. These investigations have disclosed practices and conditions which require new legislative methods and a change in established concepts. The bill as amended proceeds from the conclusion that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises.

H.R.Rep.No. 2850, 84th Cong., 2d Sess. 3 (1956). The Senate Report stated that

> [d]ealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealers in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.

S.Rep.No. 2073, 84th Cong., 2d Sess. 2 (1956).

The disparity in bargaining power was founded on the vast difference between the economic power of manufacturers and that of dealers. In 1956, the Senate committee found that there were five passenger car manufacturers, three of whom produced more than 95 percent of all passenger cars sold in the United States. S.Rep.No. 2073, 84th Cong., 2d Sess. 2 (1956). There are about 40,000 franchised automobile dealers, with an "average investment" of about $100,000. *Id.*[3]

[3] The inequity in bargaining power which concerned Congress in 1956 remains a legitimate concern. In 1983, 74 percent of the 9.2 million passenger cars sold in the United States were manufactured by the four major domestic automobile manufacturers. General Motors Corporation alone was responsible for 44 percent of those cars. Motor Vehicle Manufacturers Association, *Motor Vehicle Facts and Figures* 14-15 (1984). At the end of 1983, the average net worth of a franchised dealer was $523,000. National Automobile Dealers Association, *Data* (1984). By contrast, at the end of 1983, the net worth of General Motors Corporation was about $21 billion.

Congress found that because of this superior bargaining power,

> the manufacturer, in negotiating with individual dealers, has been able to obtain agreements which, while bilateral in form, have been unilateral in fact. They are designed to give maximum legal and economic protection to the manufacturer's interests. They do not represent the free will of both parties, as do ordinary contracts . . . .
>
> In various ways the manufacturers have succeeded in inserting clauses in the franchises to exempt them from all legal liability to their dealers.

S.Rep.No. 2073, 84th Cong., 2d Sess. 3 (1956).

The Senate Report stated that

> experience has indicated that where there exists a disproportion of power between two bargaining groups, the rights of the weaker party must be protected by law and should not depend upon the whim of the stronger.

Id. at 6. The Act tried to remedy the disparity between manufacturer and dealer

> by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover compensatory damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers . . . .

H.R.Rep.No. 2850, 84th Cong., 2d Sess. 1 (1956).

The Act, thus, was designed to provide a right of federal court review of certain disputes, "irrespective of contractual provisions" which had been incorporated into or eliminated from franchise contracts through the superior bargaining power of manufacturers. H.R.Rep.No. 2850, 84th Cong., 2d Sess. 2, 6 (1956).

Both the district court and the court of appeals found that the Dealers' Day In Court Act claims were arbitrable because the allegations came within the scope of the arbitration clause in the contract. Allowing a contractual arbitration clause to waive the protection of the Act directly contradicts the purpose of Congress in passing the Act.

Because the parties to automobile franchise contracts did not have equal bargaining power, the Act was passed to provide a remedy for dealers, independent of the "negotiated" terms of the contract. The Congressional concern was that contract terms are dictated by the manufacturer. All franchise contracts are form contracts drawn up by the manufacturers and their terms are dictated by the manufacturers. S. Macaulay, *Changing A Continuing Relationship Between A Large Corporation And Those Who Deal With It: Automobile Manufacturers, Their Dealers, And The Legal System*, 1965 Wisc. L. Rev. 483 (1965).

There is no basis upon which to assume that an arbitration clause, any more than any other term in a franchise contract, is a bargained-for term. Just as manufacturers could impose termination at will clauses in franchise contracts in the 1950's, so too can they impose mandatory arbitration clauses in the 1980's.

Given the circuit court's opinion, a mandatory arbitration clause would become an important and effective method for the repeal by manufacturers of dealers' rights under the Act.

It is not simply that an arbitration clause would move the claims from one forum to another. It is that the quality of the forum changes in a manner inimical to the statute and to the group Congress wished to protect—the dealers. As the courts have pointed out, commercial arbitrators are inappropriate persons to consider matters affecting the public interest. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968). The objectivity that the federal court system provides to litigants, as envisaged by the protective nature of the Dealers' Day In Court Act, would be lost. *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414, 421 (9th Cir. 1984).

This is particularly true in this situation, where the arbitration clause calls for arbitration in Japan. Arbitration in Japan requires a tremendous outlay by the dealer for lawyers, translators and arbitration fees in Japan. It is difficult to imagine that such an arbitration clause was "bargained for" by two parties of equal bargaining strength.

The circuit court's opinion, quite simply, puts the dealers back into the trap which Congress thought it was eliminating almost thirty years ago. Then, the House Report pointed out that "[c]onfronted with express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer." H.R.Rep.No. 2850, 84th Cong., 2d Sess. 5 (1956). The Senate Report

similarly stated "[t]he terms of this one-sided document compelled the courts to conclude that, however inequitable the consequences, the dealer executing such a franchise had, for all practical purposes, surrendered his right to litigate his grievance." S.Rep.No. 2073, 84th Cong., 2d Sess. 3 (1956). Thus, the heart of the remedy provided by Congress was that "irrespective of contract terms," the dealer has an opportunity for judicial determination of his claim. As one court has put it in a different context, "to say that a dealer has waived and is estopped to assert a claim that he may have against the manufacturer based on the Dealer [Day In Court] Act, merely upon the application of a provision of the original sales agreement between the parties, would amount to doing by indirection what is clearly prohibited by a direct course of action." *Blenke Bros. Co.* v. *Ford Motor Co.*, 217 F. Supp. 459 (N. D. Ind. 1963).

II. The Federal Arbitration Act Should Not Be Applied To Statutory Claims Where Disparities In Bargaining Positions Have Been Subject To Congressional Action.

Courts have been reluctant to apply the Federal Arbitration Act in situations where federal statutory protection has been afforded to parties in unequal bargaining positions. *Wilko* v. *Swan*, 346 U.S. 427 (1953); *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414 (9th Cir. 1984); *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977). *But see, e.g., Ingbar* v. *Drexel Burnham Lambert, Inc.*, 683 F.2d 603 (1st Cir. 1982).

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, was passed over 40 years prior to the Dealer's Day In Court Act. It was intended to reverse "centuries

of judicial hostility to arbitration agreements," *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), and was designed to allow parties to a contract to avoid the cost and delay attendant upon litigation. *Id. See also Southland Corp.* v. *Keating*, ___ U.S. ___, 104 S. Ct. 852 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). In addressing the question of whether the Federal Arbitration Act preempts a state law, this Court said that Congress had declared a national policy favoring arbitration agreements and had mandated their enforcement, vis-à-vis state law. *Southland Corp.* v. *Keating*, ___ U.S. ___, 104 S. Ct. 852 (1984).

Nevertheless, this Court has held in certain instances that the policy favoring arbitration must yield to other Congressional policies. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), this Court held invalid under the Securities Act of 1933 an arbitration agreement providing for arbitration of any controversy between the investor and his brokerage firm. The protection Congress afforded to investors under the Securities Act was "not easily reconcilable" with the Congressional policy favoring arbitration. 346 U.S. at 438. And it was the policy favoring arbitration which had to yield.

In *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414 (9th Cir. 1984), the Ninth Circuit held that certain claims under the Commodity Exchange Act ("CEA") were not properly referrable to arbitration. Among other important factors, the Ninth Circuit was "influenced by the protective nature of the CEA. A principal purpose of the CEA 'is to ensure fair practice and honest dealing' in commodity futures trading." 734 F.2d at 421 (citations omitted). That fact coun-

selled against allowing arbitrators to interpret the statute. *Id.*

Aligned to a consideration of the "protective nature" of the statute is a consideration of the bargaining posture of the parties. As the Seventh Circuit has pointed out, *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 558 F.2d 831 (7th Cir. 1977), that factor was important to the analysis in both *Wilko* and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974). Where, as in *Scherk*, "both parties possessed formidable interests and where their arbitration agreement emerged from a period of prolonged and extensive negotiations [,] . . . the waiver of a statutory remedy in the courts could be realistically perceived as the product of a bargain." 558 F.2d at 835. Conversely, where both parties do not possess formidable financial interests and where their arbitration agreement does not emerge from extensive negotiations, the waiver of a statutory remedy in the courts cannot be perceived as the product of a bargain.

The later and specific Congressional policy of protection for the dealer should yield to the earlier, more general Congressional policy favoring arbitration. See *Kadzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976).

III. Like The Antitrust Laws With Which It Is Aligned, The Dealers' Day In Court Act Represents An Important National Policy And Claims Under It Should Not Be Made Subject To Arbitration.

Both Congress, in passing the Dealers' Day In Court Act, and the courts, in adjudicating claims under it, have viewed the Act as an extension of the antitrust laws. Codified at Title 15, the Act's enacting clause

begins "[t]o supplement the antitrust laws of the United States . . . ." The examples of coercion and intimidation given in the House Report also constitute violations associated with the antitrust laws.

> For example, manufacturer pressure, direct or indirect, upon a dealer to accept automobiles, parts, accessories, or supplies which the dealer does not need, want, or feel the market is able to absorb, may in appropriate instances constitute coercion or intimidation. Similarly, coercion or intimidation may be found where the manufacturer attempts to require the dealer to handle exclusively, or sell a specified quota of, parts, accessories, and tools made or approved by the manufacturer.

H.R.Rep. No. 2850, 84th Cong. 2d Sess. 9 (1956).

Courts interpreting the Dealers' Day In Court Act have found it to be part of a broad antitrust program.

> It is obvious that the Dealers' Act does have as its objective the avoidance of abuse of economic power. Such is one of the objectives of the antitrust laws. It is clear that the Dealers' Act was intended to supplement those laws. It also seems clear that the Dealers' Act is part of a broad evolutionary antitrust program.

Schnabel v. *Volkswagen of America, Inc.*, 185 F. Supp. 122 (N.D. Iowa 1960). See also *Buono Sales, Inc.* v. *Chrysler Motors Corp.*, 449 F.2d 715 (3rd Cir. 1971) (Congress trying to reach "border-line antitrust violations"); *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970); *Kotula* v. *Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965); *Blenke Bros. Co.* v. *Ford Motor Co.*, 217 F. Supp. 459 (N.D.Ind. 1963). In many instances, allega-

tions of violations of the Dealers' Day In Court Act rest on the same facts underlying alleged violations of the antitrust laws. Such is true in this case. *Mitsubishi Motor Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 723 F.2d at 161.

As the courts have pointed out in establishing the antitrust exception to arbitrability of claims pursuant to the Federal Arbitration Act, the antitrust laws fulfill an important function in this country's economy by preserving competition. *See United States* v. *Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962).

In *American Safety Equipment Corp.* v. *J. P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968), the Second Circuit held that antitrust claims were inappropriate for arbitration. In distinguishing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967), the Court said

> there was not present in *Prima Paint* . . . that clash of competing fundamental policies which we find in this case . . . : the conflict between federal statutory protection of a large segment of the public, *frequently in an inferior bargaining position*, and encouragement of arbitration as a "prompt, economical and adequate solution of controversies."

391 F.2d at 826, quoting *Wilko* v. *Swan*, 346 U.S. 427, 438. (Emphasis added.)

In its analysis, the *American Safety* court also questioned "whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we

think that Congress would hardly have intended that." 391 F.2d at 827. The same concern is present in this case, where the parties are of vastly unequal bargaining power and it is the contract between them which includes the arbitration clause.

In the same case, the court also stated that antitrust violations can affect thousands of people, for example, in terms of higher rates or prices passed on to consumers. While all antitrust violations might not reach such proportions, the court said it was important, in fashioning a rule to govern the arbitrability of antitrust claims, to consider the rule's potential effect.

So, too, in this case, while the immediate effect may seem insignificant in scale, a general rule that arbitration clauses would govern Dealers' Day In Court Act claims could change contracts throughout the automobile industry. Lack of a court remedy for "borderline antitrust violations" could encourage conduct resulting in higher, non-competitive prices for new cars and trucks.

Given the dominant roles that automobiles and trucks play in American society, violations of the Act also are significant on a national scale. According to the U.S. Department of Commerce, in 1982, there were about 24,700 automobile and truck franchise dealers in the United States. U.S. Dept. of Commerce, Bureau of Industrial Economics, *Franchising In The Economy: 1982-1984* 22 (1984). Those franchises had sales of about $157 billion. *Id.* Estimates for 1984 projected sales at $208.9 billion or 16.5 percent of all retail sales in the United States and more than half of all franchise sales. *Id.* at 12.

Like the national policy reflected by the antitrust laws, the national policy reflected by the Dealers' Day In Court prohibits the use of arbitration clauses in contracts between manufacturers and dealers to resolve Dealers' Day In Court Act violations. The aggrieved dealer under the Act, like the aggrieved party under the antitrust laws, is entitled to its day in court.

CONCLUSION

For the reasons stated above, NADA submits that the decision of the First Circuit, affirming the district court's holding that claims under the Act should be submitted to arbitration, be reversed.

Respectfully submitted,

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Dated: January 24, 1985

RESPONDENT'S

BRIEF

NOS. 83-1569 and 83-1733

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,

—*against*—

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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Questions Presented

1. Whether a party can be compelled to arbitrate a claim based upon a statute designed for that party's protection, pursuant to a limited arbitration clause drafted by the very party that the statute was intended to provide protection against?

2. Whether a foreign manufacturer which has chosen to expand its sales operations into the American marketplace can compel a party to arbitrate, on foreign soil, a claim based upon the Sherman Anti-Trust Act, 15 U.S.C. § 1 et seq.

The Parties

The stock of Soler Chrysler-Plymouth Inc. (now known as SCP, Inc.) is not publicly traded nor is the corporation related to, or affiliated with, any other corporation. On September 7, 1984 SCP, Inc. filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1 et seq.

A description of the other parties to this action is set forth in the brief of petitioner.

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Respondent and
Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF CROSS-PETITIONER

Cross-Petitioner Soler Chrysler-Plymouth Inc. hereby submits its brief in support of its cross-appeal from the judgment of the United States Court of Appeals for the First Circuit and in opposition to the brief submitted by Mitsubishi Motors Corporation.

Opinions Below

The opinion of the Court of Appeals is reported at 723 F.2d 155 (1st Cir. 1983), and a copy thereof is annexed as Appendix A to the petition for a writ of certiorari filed by Mitsubishi Motors Corporation ("Mitsubishi Petition"). The opinion of the District Court for the District of Puerto Rico is annexed as Appendix B to the Mitsubishi Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on December 20, 1983 and is annexed to the Mitsubishi Petition as Appendix C. The Cross-Petition for Writ of Certiorari was timely filed on April 20, 1984 and was granted on October 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Treaties and Statutes

The statutory provisions related to the cross-petition are the Automobile Dealers Day in Court Act, 15 U.S.C. § 1222, which is set forth in Appendix A to the cross-petition, the Puerto Rico Dealers Act, 10 L.P.R.A. § 278a, set forth in Appendix B to the cross-petition and the Puerto Rico Antitrust statute, 10 L.P.R.A. §258, set forth in Appendix C to the cross-petition.

Counter-Statement of the Case

A. Background.

On October 31, 1979, Soler Chrysler-Plymouth, Inc. ("Soler") and Chrysler International, S.A. ("CISA"), a subsidiary of Chrysler Corporation ("Chrysler"), entered into a Distributor Agreement pursuant to which Soler was granted the right to purchase certain automotive products for resale. (JA 18-41)[1] At the same time, Soler entered into a Sales Procedure Agreement with both CISA and Mitsubishi designed to supplement the Distributor Agreement and to facilitate the sale by Soler of vehicles manufactured by Mitsubishi. (JA 42-57)

During the model year 1980, which commenced November 1, 1979, Soler was extremely successful in selling Mitsubishi manufactured vehicles. In fact, Soler sold more than four times the number of vehicles than its predecessor had sold in the previous model year and exceeded its minimum sales volume requirement of 1,992 vehicles. (JA 188) In so doing, Soler helped to develop a large and profitable market for Mitsubishi vehicles in Puerto Rico. (JA 134)

For the following year Mitsubishi substantially increased Soler's minium sales volume from 1,992 vehicles to 4,750 vehicles. (JA 179) Mitsubishi also made clear that the achievement of this minimum sales volume was a necessary prerequisite to Soler's continuing as a distributor for Mitsubishi vehicles. (JA 188) This was communicated

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[1] References to the Joint Appendix are in the form "JA [page number]." References to the Appendices to the Petition for Certiorari are in the form of "P [appendix] [page number]." References to the Record before the Court of Appeals are in the form "R [page number]."

to Soler in Mitsubishi's letter of June 24, 1980, which established the 1981 minimum sales volume at 4,750 vehicles: (JA 179-180)

> "You agree that achievement of the MSV for the 1981 Model Year set forth above is an essential obligation of yours under the Distributor Agreement and failure to achieve such MSV would adversely and substantially affect the interest of CISA and MMC in promoting the marketing and distribution of Motor Vehicles in Puerto Rico. You further agree that achievement of the minimum sales volume set forth above will be necessary for you to achieve a satisfactory level of sales and profits for you to continue as a distributor of Motor Vehicles."

During the year 1981 the market for vehicles in Puerto Rico took a sharp turn for the worse. However, contrary to Mitsubishi's claim that Soler exercised poor business judgment and ordered too many vehicles, Soler only ordered a sufficient number of vehicles, 4,800, to barely meet its minimum sales volume requirement of 4,750 vehicles. (JA 188)

Nevertheless, because of the slackening demand for vehicles in Puerto Rico, Soler was unable to sell the vehicles it had ordered in Puerto Rico, and in conjunction with the other local distributors, actively pursued the possibility of transshipping some of the vehicles to the mainland United States or Latin America. (JA 188)

Initially, Mitsubishi refused to allow transshipment on the grounds that the transshipment of vehicles was "an issue with a tint of political complication" and could trigger a control on exports for the market of Puerto Rico by the Japanese government. This explanation was set forth in Mitsubishi's telex of July 8, 1981 (JA 142):

> "In the meantime, we are very sorry that we could not accept your request in the last paragraph of your IWM-121. As I told you at the previous meeting, the diversion of the units in Puerto Rico to the U.S. mainland would trigger a drastic Japanese government control on volume of exports for the market of Puerto Rico.
>
> Because this is not a simple matter of MMC-Chrysler business arrangement, but an issue with a tint of political complication, we do hope for your understanding."

Mitsubishi never explained, however, why other Japanese manufacturers, including Toyota, Nissan and Honda permitted the transshipment of vehicles from Puerto Rico to the mainland or why the transshipment of vehicles from one part of the United States (Puerto Rico) to another part of the United States (the mainland) would affect the voluntary quotas established by the Japanese government. (JA 189, 193)

Shortly thereafter, Chrysler Corporation, in a telex dated July 31, 1981, also informed Soler and the other local Puerto Rico distributors that the transshipment of vehicles would not be permitted. Chrysler explained that the proposed transshipment of vehicles would violate an agreement Chrysler had entered into with Mitsubishi. The telex reads in pertinent part (JA 143-144):

> "Chrysler's take of Mitsubishi vehicles for the U.S. market is negotiated directly between the two companies and allocations and subsequent dealer orders are based upon this negotiated volume. There can be no deviation from this agreement and U.S. Dealers would not be permitted by Chrysler Corporation to accept cars diverted from Puerto Rico for resale thru their dealerships."

Soler, not satisfied by the explanations offered by Mitsubishi and Chrysler, nevertheless continued to pursue the possibility of transshipping these vehicles. Upon learning of these efforts, however, Mitsubishi in a letter dated September 4, 1981, demanded that these efforts be terminated. (JA 181-183) In that same letter, after setting forth a "laundry list" of new objections to the proposed transshipment, Mitsubishi also confirmed that the proposed transshipment might violate an agreement Mitsubishi had entered into with Chrysler (JA 182-183):

> ". . . while we do not in any way speak for Chrysler Corporation and its subsidiaries ("CHRYSLER"), the transaction you propose may violate certain agreements between SOLER and CHRYSLER or interfere with certain rights now held by CHRYSLER pursuant to agreement with MMC."[2]

Thereafter, Soler and the other local distributors sought to overcome the newly raised objections to transshipment set forth in Mitsubishi's September 4, 1981 letter. For example, Mitsubishi claimed it would be illegal to sell vehi-

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[2] The fact that transshipment would violate the Mitsubishi-Chrysler agreement was also confirmed in Mitsubishi's letter of February 9, 1982: (JA 145-147)

> "Any present sale or distribution by you of MMC vehicles in the mainland United States would also require the consent of Chrysler Corporation and its wholly-owned subsidiary Chrysler International S.A. (Collectively 'Chrysler'), pursuant to their respective rights under certain agreements with us and with you. We have no reason to believe that Chrysler would waive its rights and permit you to make such sales. Furthermore, it is possible that a transshipment of MMC vehicles such as you have previously proposed could expose MMC to liability to Chrysler or other parties under applicable law."

cles which were not equipped with heaters and defoggers to the mainland United States. (vehicles manufactured for Puerto Rico did not, of course, include heaters and defoggers). The distributors sought to solve this problem by offering two possible solutions: (1) that Mitsubishi provide them with vehicles that were so equipped, or (2) that pursuant to the Sales Procedure Agreement they purchase these parts and install the parts themselves. (JA 148-149) Both proposals, however, were flatly rejected by Mitsubishi. (JA 145-147)

With regard to the first proposal, it must be noted that on previous occasions Mitsubishi had offered to install additional options on vehicles free of charge. (JA 131-132). Nevertheless, when the distributors requested the installation of heaters and defoggers, which they had offered to pay for, Mitsubishi refused to provide same. With regard to the second proposal Mitsubishi claimed that it could not be sure the parts would be installed in a workmanlike manner. Yet, pursuant to the Sales Procedure Agreement Soler provided warranty service on each and every vehicle sold for Mitsubishi as well as for Chrsyler and Soler had never received complaints concerning this work. (JA 189-190)

Mitsubishi also objected to the proposed transshipment claiming that transshipped vehicles might not be included within the Chrysler warranty system. However, Soler provided warranty service to any vehicle, whether manufactured by Chrysler or Mitsubishi, that had been sold in the mainland United States and brought to Puerto Rico. Likewise when Soler's customers took vehicles to the mainland they were provided with warranty service. (JA 189-

190) Thus Mitsubishi's objection in this respect appeared to be lacking in merit.[3]

Finally, Mitsubishi objected to the proposed transshipment claiming that it had received no assurance that the vehicles would be properly packed, shipped or inspected upon arrival. However, if Mitsubishi had not rejected each and every proposal regarding the proposed transshipment, there is no reason why suitable arrangements, taking into account the legitimate interests of both sides, could not have been worked out.[4] (JA 190)

In the meantime, while the parties continued to disagree as to the propriety of the proposed transshipment, the vehicles remained unshipped and unpaid for in Japan. When it became apparent, however, that Mitsubishi could not be persuaded that its refusal to permit the transshipment of these vehicles was improper, Soler, in a telex dated February 12, 1982, disclaimed responsibility for the vehicles, explaining to Mitsubishi that its refusal violated United States and Puerto Rico anti-trust laws. The telex, in pertinent part, reads: (JA 131-132)

> "In our letter of August 18 to Mr. Goto replying to his letter of August 12, we gave you information that proved your reasons for prohibiting us from selling cars to the mainland had no basis whatsoever. Your position was, and is, a serious

[3] Even if some of the transshipped vehicles would not have been covered under the Chrysler warranty system, the reason for the lack of coverage would undoubtedly be based on the terms of the challenged Mitsubishi-Chrysler agreement.

[4] Mitsubishi's concern that high octane fuel was virtually unavailable in Latin America had no relevance to the proposed transshipment to the United States mainland.

> restraint of trade on your part and is against U.S. and Puerto Rico laws.

In February 1982,[5] Mitsubishi also unveiled a proposed plan to replace Soler and the two other Mitsubishi distributors in Puerto Rico, with its own wholly owned subsidiary. (JA 152-157) Soler, however, rejected Mitsubishi's proposed plan.[6]

Shortly thereafter in an apparent attempt to "beat Soler to the punch" and foreclose Soler from litigating its anti-trust claims, Mitsubishi sought to compel arbitration of this dispute in Japan before the Japan Commercial Arbitration Association.

B. The proceedings before the District Court.

On March 15, 1982 Mitsubishi commenced the within action by filing a complaint seeking to compel Soler to arbitrate certain disputes related to the unshipped vehicles. (JA 9-17) Thereafter, on May 7, 1982, Soler served an answer and counterclaims on Mitsubishi, and, in addition, joined CISA as a defendant on certain counterclaims. Among its counterclaims Soler alleged violations of the Sherman Act, the Automobile Dealers' Day in Court Act, the Puerto Rico anti-trust statute, and the Puerto Rico Dealers Act. (JA 76-103)

[5] Contrary to Mitsubishi's claim that the Sales Procedure Agreement expired on October 31, 1981, the parties treated the contract as continuing in force. See, for example, the Mitsubishi proposal of February 22, 1982. (JA 152-157)

[6] That plan has since been effectuated by Mitsubishi.

On May 27, 1982, Mitsubishi filed a supplemental motion seeking an order compelling Soler to arbitrate each of the above counterclaims. (JA 113-114)

Before the District Court, Soler argued that the refusal on the part of Mitsubishi, Chrysler and CISA to allow the transshipment of the vehicles in question constituted an unlawful territorial restraint of trade which served to void any obligation it may have otherwise had to pay for the vehicles. In addition, Soler contended that its anti-trust and Automobile Dealers Day in Court Act counterclaims so permeated Mitsubishi's contract claims that the District Court should stay arbitration pending resolution of the anti-trust counterclaims in the District Court.

Soler also argued that the arbitration clause in question was a limted one, confined to specifically enumerated articles contained in the Sales Procedure Agreement, and that Soler had never agreed, nor could the arbitration clause be interpreted to read, that it had agreed to arbitrate its statutory claims.

The District Court, however, rejected each of these arguments, and with the exception of a portion of Soler's Automobile Dealers' Day in Court counterclaim,[7] ordered that all of Soler's statutory counterclaims, including its counterclaim under the Sherman Act, be referred to arbitration in Japan. (PB 1-13)

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[7] The Court held that the portion of Soler's Automobile Dealers' Day in Court Act counterclaim which contained allegations that Mitsubishi had acted in bad faith in setting minimum sales volumes was outside the scope of the arbitration clause. The remaining allegations of the counterclaim were referred to arbitration.

C. The ruling of the Court of Appeals.

The Court of Appeals reversed the District Court's determination that Soler's anti-trust counterclaims[8] be referred to arbitration and remanded the case to the District Court for a determination of whether the anti-trust counterclaims permeated Mitsubishi's contract related claims. (PA 1-29) In so doing, however, the Court suggested to the District Court that if it found no permeation, the decision of the arbitrators might obviate the need to ever hear the anti-trust issues. The Court stated: (PA 29)

> "If the district court believes that Soler's antitrust claims are separable and that the interests of judicial economy would be served by staying a determination of these claims pending arbitration, it will be able to allow the arbiter to make an initial determination on the 'good cause' issue. *If the arbiter finds that good cause existed, the district court may not need to reach the antitrust issues . . .*" (emphasis added)

Thus, while holding that anti-trust issues were not arbitrable, the Court's decision, in effect, permitted an arbitrator to decide anti-trust issues.

The Court also held that the arbitration clause at issue, which is limited to specifically enumerated articles contained in the Sales Procedure Agreement and which was

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[8] The Court of Appeals reversed the District Court's decision "submitting Soler's Anti-Trust claims" to arbitration. Nevertheless, Mitsubishi has taken the position that Soler must arbitrate its claim based upon the Puerto Rico anti-trust statute, 10 L.P.R.A. § 257 et seq. Soler disagrees with Mitsubishi's position and briefly discusses this issue later in this brief.

entitled by Mitsubishi, "Arbitration of Certain Matters," encompassed Soler's other statutory claims and therefore affirmed the District Court's determination that these claims should be arbitrated.

D. The arbitration proceedings in Japan.

During the pendency of Soler's appeal to the Court of Appeals, arbit. ion proceeded in Japan. Soler, therefore, retained the services of Japanese counsel and submitted an answer and counterclaims in response to Mitsubishi's demand for arbitration.[9]

Pursuant to the District Court's determination that Soler's statutory counterclaims, including its anti-trust counterclaims, were subject to arbitration, Soler demanded arbitration of same. It also raised its anti-trust claim as a defense to Mitsubishi's claim of non-payment for the disputed vehicles.

Prior to the commencement of the arbitration hearings, however, the Court of Appeals reversed the District Court's determination that Soler's anti-trust claims were subject to arbitration. Soler therefore sought, and after some difficulty was permitted to, withdraw its anti-trust defenses and counterclaims. This, however, created an additional

[9] The cost of arbitrating in Japan is staggering. In addition to the cost of retaining Japanese counsel, travelling and translating documents, the rules of the Japan Commercial Arbitration Association require that the parties remunerate the arbitrators and pay an administrative fee for *each* claim or counterclaim a party requests be arbitrated, before they are arbitrated. (JA 223-225) (R 265) This administrative fee is calculated on a sliding scale based upon the size of each claim. Thus, a party must pay a substantial fee merely for the "privilege" of having its claim heard by the arbitration tribunal.

problem for Soler. After all, Soler admitted it did not pay for the 966 vehicles which Mitsubishi, CISA and Chrysler had refused to let it transship, and its primary defense to Mitsubishi's claim of non-payment was that the refusal to allow the transshipment voided any responsibility it may have otherwise had to pay for the vehicles. Consequently, the withdrawal of its anti-trust defenses and counterclaims left Soler with virtually no means of defending itself in the arbitration proceeding.

E. The remand to the District Court.

Following the remand of the case to the District Court, Soler (1) moved to amend its anti-trust counterclaims to join Chrysler Corporation as a defendant and allege a horizontal restraint of trade between competitors on the same level of the marketplace and (2) sought a stay of arbitration on the grounds that Soler's anti-trust claims permeated the claims Mitsubishi sought to arbitrate.

The District Court, however, without ever ruling on Soler's motion to amend its complaint *and without ever mentioning the transshipment issue,*[10] held:

> "With respect to the likelihood of Soler's antitrust counterclaim, suffice it to say that to the extent that it is premised on the termination of its purported distributorship and the substitution of other distributors, including a wholly-owned subsidiary of MMC, it appears to be lacking in substance."

[10] Thus, Mitsubishi is being less than candid when it claims on page 11 of its brief that the District Court determined that Soler's anti-trust allegations "appear[ed] to be lacking in substance" and the statement on page 28 of its brief that the District Court described Soler's challenge to the disputed territorial restriction as "lacking in substance" is incorrect.

The Court also found no permeation, refused to stay the arbitration in Japan, and instead stayed the District Court proceedings pending arbitration in Japan. (JA 6) Since by reason of the unusual procedural history of this case, virtually no discovery has taken place, the District Court's opinion was based upon the same record that is before this Court.

Soler then requested reconsideration and reargument of the District Court's decision, pointing out that the Court had not ruled on Soler's motion to amend its counterclaims to add Chrysler as a defendant and that Soler's textbook claim of permeation was premised on the refusal to allow the transshipment of the very vehicles Mitsubishi sought payment for in the arbitration proceeding, and not on its claim of wrongful termination of its distributorship.

The District Court, however, in a one word decision "denied" Soler's request for reargument and reconsideration. Thus, to this date, there has been no judicial determination regarding Soler's likelihood of succeeding on its claim that the refusal on the part of Mitsubishi, Chrysler and CISA to allow transshipment of these vehicles violated the anti-trust laws.

F. The filing of the bankruptcy petition.

On September 7, 1984, Soler, unable to finance the arbitration proceedings and indebted to, among others, its American and Japanese attorneys, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1 et seq.

Summary of Argument

Compelling a party to arbitrate a claim based upon a statute designed for that party's protection, may, for all practical purposes, deny that party the protection the statute was designed to afford. *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968). This is especially true where, as is the case here, the arbitration is to take place on foreign soil and it can hardly be expected that the public policy objectives of the legislation will be effectuated. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) (Douglas, J. dissenting).

Consequently, in determining whether a statutory claim is encompassed within the scope of an arbitration clause, the general rule that arbitration clauses are to be broadly construed is inappropriate. *Levya* v. *Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir.), cert. denied 444 U.S. 827 (1979).

In the instant case the Court of Appeals was faced with a limited arbitration clause which was confined to specifically enumerated articles included in the Sales Procedure Agreement. None of these articles referred either directly, or indirectly, to statutory claims. It is therefore submitted, especially in view of the protective nature of the statutes involved, that the Court of Appeals erred in determining that Soler's statutory claims were encompassed within the scope of the arbitration clause.

ARGUMENT

I.

Soler never agreed to arbitrate statutory claims.

This Court has made clear that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

The reason for this is that a party agreeing to resolve disputes by arbitration waives many of its courtroom rights. *Parsons & Whittemore Overseas Co. Inc.* v. *Societe Generale De L'Industrie Du Papier* (*RAKTA*), 508 F.2d 969 (2d Cir. 1974). Included in those rights may be the right to demand a trial by jury, the right to subpoena witnesses and the right to engage in the extensive pre-trial discovery permitted by the Federal Rules of Civil Procedure. The judicial review of an arbitrator's award is also significantly lesser than that afforded a judicial decision and by agreeing to arbitrate in a distant location a party may be deprived of a convenient forum for the resolution of its dispute. *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953), *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 532 (1974) (Douglas, J. dissenting).

In analyzing whether a party has agreed to arbitrate a claim, courts have also recognized that a difference exists between broad arbitration clauses in which parties agree to arbitrate "any controversy or claim arising out of or relating to this contract, or the breach thereof," and those arbitration clauses which are more narrow in scope.

See Alascom Inc. v. *ITT North Electric Company*, 727 F.2d 1419, 1422-23 (9th Cir. 1984); *Twin City Monorail Inc.* v. *Robbins & Myers Inc.*, 728 F.2d 1069, 1073 (8th Cir. 1984); *Coudert* v. *Paine Webber Jackson & Curtis*, 705 F.2d 78 (2d Cir. 1983); *Rochdale Village, Inc.* v. *Public Service Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979); *Cook* v. *Gristede Bros.*, 359 F.Supp. 906, 908 (D.C. N.Y. 1973); *Bruno* v. *Pepperidge Farm Inc.*, 256 F.Supp. 865 (D.C. Penn 1966). *See also Davis* v. *Chevy Chase Financial Ltd.*, 667 F.2d 160, 165 (C.A.D.C. 1981).

> A party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waive his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause.

See also the decision of Judge Kaufman in *Fuller* v. *Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977) where the Court affirmed the District Court's determination that a tort claim did not fall within the scope of an arbitration clause:

> We reach our result cognizant of the federal policy favoring arbitration, and accept the standard rule of construction that arbitration agreements are to be liberally construed . . . *But federal policy alone cannot be enough to extend the application of an arbitration clause far beyond its intended scope.* (emphasis added)

The arbitration clause in issue herein is a limited one.[11]

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[11] Thus distinguishing this case from *Southland Corporation* v. *Keating*, —— U.S. ——, 104 S. Ct. 852, 860 (1984) which involved a clause calling for arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach hereof."

Not only is it labeled "ARBITRATION OF CERTAIN MATTERS," but the clause is confined to only those disputes arising from specifically enumerated articles included in the Sales Procedure Agreement.

The arbitration clause reads: (JA 52-53)

> VI-ARBITRATION OF CERTAIN MATTERS
>
> All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

In addition to Articles I-B through V of the agreement, which are within the scope of the arbitration clause, the agreement also includes numerous articles not subject to arbitration; i.e. "EFFECTIVE DATE, TERM AND TERMINATION" (Article VII), "CISA RECEIVABLES," (Article VIII), "DISCLAIMER," (Article IX), "BUYER NOT AN AGENT AND NOT AN MMC DISTRIBUTOR" (Article X), "CISA AS PARTY (Article XI), "STATUS OF DISTRIBUTOR AGREEMENT" (Article XII), "AMENDMENTS" (Article XIII), "APPLICABLE LAW" (Article XIV) and "INABILITY TO PERFORM" (Article XV).

It is thus apparent that the parties did not intend that all disputes arising between them be settled by arbitration, only selected disputes. In addition, nowhere did the parties evidence an intention to arbitrate statutory claims.

Nevertheless, in rejecting Soler's argument that it had not agreed to arbitrate statutory claims, the Court of Appeals stated:

> The question, therefore, is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims . . . are within the scope of the arbitration clause, whatever the legal labels attached to those allegations. *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth Inc.*, 723 F. 2d 155, 159 (1st Cir. 1983)

It is submitted that in so ruling the Court of Appeals misconstrued the scope of the arbitration clause at issue, failed to recognize the important difference between statutory and contractual claims, and ignored the manifest disparity in bargaining power between the parties herein.

A. The Court of Appeals ignored the important difference between contractual and statutory rights.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court, in refusing to compel arbitration of a claim under Title VII of the Civil Rights Act, made clear that an arbitrator "has authority to resolve only questions of contractual rights." *supra* at 54. This Court also emphasized that there are significant differences between contractual and statutory rights:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. *The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.* And certainly no inconsistency results

> from permitting both rights to be enforced in their respectively appropriate forums. *supra* at 49-50 (emphasis added)

Approximately six years later, in *Barrentine* v. *Arkansas-Best Freight System Inc.*, 450 U.S. 728 (1980), this Court again relied upon the difference between contractual and statutory rights when it held that claims under the Fair Labor Standards Act were independent of contractual rights derived under a collective bargaining agreement. In determining that an arbitrator could not resolve statutory claims under the FLSA by reason of the public policy considerations attendant thereto, the Court noted that "[t]hese statutory questions must be resolved in light of volumes of legislature history and over four decades of legal interpretation and administrative rulings." *supra* at 743.

The same considerations of public policy that were relied upon by this Court in the above decisions are relevant to the statutory counterclaims asserted by Soler herein. The Automobile Dealers Day in Court Act, 15 U.S.C. § 1221 et seq., was enacted by Congress to protect automobile dealers from overreaching on the part of more powerful automobile manufacturers. *See New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978). In fact, the legislative history of the Act provides:

> Reasons for Bill
>
> Concentration of economic power in the automobile manufacturing industry of the United States has developed to the point where legislation is required to remedy the manifest disparity in the ability of franchised dealers of automotive vehicles to bargain with their manufacturers. 3 U.S. Code of Congressional and Administrative News 1956, p. 4596-97.

As the title of the Act suggests, and as the legislative history expressly provides, one of the purposes behind the legislation was to assure a dealer the opportunity "*to secure a judicial determination, irrespective of contract terms,* as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, cancelling or not renewing his franchise." (emphasis added) 3 U.S. Code of Congressional and Administrative News 1956, p. 4600. Moreover, the Act was passed in 1956, *subsequent* to the enactment of the Federal Arbitration Act.

By interpreting the arbitration clause at issue herein so as to encompass Soler's Automobile Dealers Day in Court Act claim, the Court of Appeals has, in effect, allowed Mitsubishi to do indirectly, what Congress expressly prohibited automobile manufacturers from doing directly, i.e. denying a dealer his "day in court."[12] *See Blenke Brothers Co.* v. *Ford Motor Company*, 217 F.Supp. 459, 464 (D.C. Ind. 1963):

> It is pointed out in the commentary on the statute contained in the U.S. Code Congressional and Administrative News, supra, that the size and economic power of the automobile manufacturers as compared with that of the individual dealers made this legislation necessary. It is clear that Congress intended that "[t]he dealer was to be given his day in court on an allegation of bad faith termination regardless of the legal import of the words used in the 'contract' which he had signed." Barney Motor Sales v. Cal Sales, Inc., supra, 178 F.Supp. at 174.

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[12] In fact, it is submitted that regardless of the scope of an arbitration clause, a claim under the federal Dealers Day in Court Act may not be arbitrated.

> *Thus, to say that a dealer has waived and is estopped to assert a claim that he may have against the manufacturer based on the Dealer Franchise Act, merely upon the application of a provision of the original sales agreement between the parties, would amount to doing by indirection what is clearly prohibited by a direct course of action.* (emphasis added)

It is submitted that the reasoning of this decision applies with even greater force herein, where by virtue of the arbitration clause inserted into the contract by Mitsubishi, Soler has been ordered to arbitrate its Automobile Dealers Day in Court Act claim in Japan before the Japan Commercial Arbitration Association.

Indeed, it is ironic that the Federal Arbitration Act, a statute intended to place arbitration agreements "upon the same footing as other contracts . . ." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) has been interpreted in this era of overburdened courts anxious to clear their crowded dockets, in such a manner as to place arbitration agreements on a far different footing than other contracts. After all, the arbitration clause in question, which specifically states it is limited to "certain matters," was drafted by Mitsubishi and was inserted into the contract by virtue of Mitsubishi's superior bargaining position. Under normal rules of contract construction, such a clause would be interpreted most strongly against the party that drafted it and all doubts regarding the scope of same would be resolved in favor of Soler. Nevertheless, in ordering Soler to arbitrate its Automobile Dealers Day in Court Act claim, precisely the opposite construction has been adopted by the Court of Appeals.

Similarly, by requiring Soler to arbitrate in Japan, its counterclaim pursuant to the Puerto Rico Dealers Act,

10 L.P.R.A. § 278 et seq., the Court of Appeals, has for all practical purposes, denied Soler the protection the Puerto Rican legislature intended it to have. In fact, the legislative history of the Act, which prohibits termination of dealership contracts except for "just cause," 10 L.P.R.A. § 278a, establishes it was enacted to protect dealers, such as Soler, from precisely the kind of actions complained of herein:

> The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaires, or agents, or without fully eliminating them, such enterprises gradually reduce and impair the extent of their previously established relationships, as soon as these dealers, concessionaires, or agents have created a favorable market and without taking into account their legitimate interests. Statement of Motives of Act No. 75.

Act 75 was also enacted in order "to level the contractual conditions between two groups financially unequal in their strength," *Walborg* v. *Tribunal Superior,* 104 D.P.R. 184 (1975),[13] and includes a provision *voiding* all clauses requiring a dealer to arbitrate claims *outside of Puerto Rico or under foreign law.* That provision reads as follows:

> § 278b-2. Interpretation pursuant to laws of the Commonwealth

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[13] In *Walborg,* the Supreme Court of Puerto Rico, after holding that the dispute was not governed by the Federal Arbitration Act, determined that the public policy provisions of Act 75 predominated over the public policy considerations favoring arbitration, and refused to compel arbitration of the dispute.

> The dealer's contracts referred to in this chapter shall be interpreted pursuant to and ruled by the laws of the Commonwealth of Puerto Rico, and any other stipulation to the contrary shall be void.
>
> Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void—June 24, 1964, No. 75, p. 231, § 3B, added June 23, 1978, No. 75, p. 251, eff. June 23, 1978.

In view of the clear and unmistakable intent of the legislature of Puerto Rico to protect dealers in the position of Soler, and the limited scope of the arbitration clause inserted into the Sales Procedure Agreement by Mitsubishi, it is submitted that the Court of Appeals erred in ordering Soler to arbitrate its claim arising under Act 75.[14]

Finally it is submitted that the Court of Appeals erred in determining that Soler's anti-trust claims were encompassed within the scope of the arbitration clause included in the contract between the parties. As this Court noted in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) the anti-trust laws occupy a unique position in our free enterprise system:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

[14] The question of whether Mitsubishi had "just cause" to terminate Soler's distributorship, also refers to Article VII of the Sales Procedure Agreement, "Effective Date, Term and Termination," an article outside the scope of the arbitration clause.

In view of the extremely important role that anti-trust laws play in our system of jurisprudence, a Court should be very hesitant in construing a limited arbitration clause, such as the one present herein, so as to encompass an anti-trust claim. It is therefore submitted that the narrow scope of the arbitration clause at issue herein, coupled with the adhesive nature of the contract, mandates a determination that Soler never agreed to arbitrate anti-trust or other statutory claims.[15]

[15] Despite the fact that the Court of Appeals reversed the District Court's decision "submitting Soler's Anti-Trust claims" to arbitration, Mitsubishi has taken the position that Soler must arbitrate its claim based upon the Puerto Rico anti-trust statute, 10 L.P.R.A. § 257 et seq. Aside from the fact that Soler believes Mitsubishi's reading of the decision is erroneous, it is submitted that by reason of the similarity between the Puerto Rico anti-trust statute and the Sherman Act, it would be incongruous to refer one counterclaim to arbitration and require the other counterclaim to be heard in a judicial forum. Not only would there be a possibility of inconsistent determinations in the two forums, but there would also be a danger that an arbitrator's decision on Soler's Puerto Rico anti-trust statute counterclaim might infringe on exclusive federal court anti-trust jurisdiction. *See Big Apple Cookie Company* v. *Springwater Cookie Company*, 517 F. Supp. 367, 368-369 (S. D. Ohio, 1981). For an analogous situation involving an ERISA claim, *see also Amaro* v. *Continental Can Company*, 724 F.2d 747, 750 (9th Cir. 1984).

B. This Court should adopt the analysis of the Ninth Circuit Court of Appeals in determining whether a statutory claim is encompassed within the scope of an arbitration clause.

In *Levya* v. *Certified Grocers of California Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979), *cert. denied* 444 U.S. 827 (1979), the Ninth Circuit, recognizing the inherent difference between statutory and contractual rights, adopted a standard for determining whether a party had agreed to arbitrate statutory claims, which is different than the standard utilized in determining whether a party had agreed to arbitrate contractual claims. Relying on this Court's decisions in *Alexander* v. *Gardner-Denver Co., supra; U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351 (1971) and *Iowa Beef Packers, Inc.* v. *Thompson,* 405 U.S. 228 (1972), the Court held:

> We believe that despite the general rule that arbitration clauses should be broadly construed . . . *contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provision for such arbitration.* (emphasis added)

Recently, in *Marchese* v. *Shearson Hayden Stone Inc.,* 734 F.2d 414, 419 (9th Cir. 1984), the Ninth Circuit again had an opportunity to discuss this difference between ordering the arbitration of statutory and contractual claims. In holding that a claim under the Commodity Exchange Act did not fall within the scope of an arbitration clause, the Court explained:

> To help us determine which disputes are intended to be arbitrated, we need to focus on the inherent distinction between "statutory and contractual rights," *Levya,* 593 F.2d at 863. It is now clear that

> at least claims based on "nonwaivable statutory rights", *Amaro* v. *Continental Can Co.,* 724 F.2d 747, 752 (9th Cir. 1984), will not easily be construed as being within the coverage of an arbitration agreement. *See e.g. Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981) (Fair Labor Standards Act, 29 U.S.C. § 201 et seq.); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq.); *Amaro,* 724 F.2d at 749 (§ 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140); *Leyva,* 593 F.2d at 863 (Fair Labor Standards Act). *Absent at least an express provision, we will not construe an agreement as contemplating arbitration of these types of statutory claims.* (emphasis added)

The approach taken by the Ninth Circuit makes good solid sense. As has been hereinbefore demonstrated, requiring a party to arbitrate a claim designed to protect that party, may effectively deny that party the protection a legislature intended to afford it. This is particularly true where, as is the case here, the arbitration is to take place on foreign soil and the party being compelled to arbitrate is financially unable to protect its interests.[16]

It is therefore submitted that the general rule that arbitration clauses are to be broadly construed should not be mechanically applied by Courts to deny a party the protection a statute was designed to afford it. Instead the

---

[16] Since such statutes are generally intended to protect a weaker party from overreaching on the part of a more powerful party, it can be anticipated that financial constraints will often preclude the weaker party from effectively participating in an arbitration proceeding in a far-off forum.

approach of the Ninth Circuit, requiring evidence of a clear and express intention to arbitrate such claims, should be considered by this Court.

In any event, regardless of whether or not the standard of the Ninth Circuit is adopted, it is submitted that the Court of Appeals erred in determining that Soler's statutory claims were encompassed within the limited arbitration clause at issue herein.

I I.

In remanding this case to the District Court the Court of Appeals provided erroneous instructions.

The Court of Appeals, upon reversing the District Court's determination that Soler's anti-trust claims should be arbitrated, remanded the case to the District Court for a determination of how the litigation should proceed. In so doing the Court of Appeals gave the following instructions: (PA 28-29)

> The district court may now, in the light of our holding that Soler's antitrust claims against Mitsubishi are not arbitrable, focus on such matters as permeation and likelihood of success and decide whether both arbitrable and nonarbitrable matters should proceed on their own course or whether one set of problems should await resolution of the other. *For example, the claim that Mitsubishi had "good cause" to terminate its dealership arrangement with Soler is part of Mitsubishi's case in chief, which will be submitted to arbitration. If the district court believes that Soler's antitrust claims are separable and that the interests of judicial economy would be*

> *served by staying a determination of these claims pending arbitration, it will be able to allow the arbiter to make an initial determination on the "good cause" issue. If the arbiter finds that good cause existed, the district court may not need to reach the antitrust issues;* if the arbiter finds that Mitsubishi did not have good cause to terminate the contract, the district court may then need to decide whether the termination was caused by a violation of the anti-trust laws. (emphasis added)

Aside from the fact that the remand instructions completely ignore the crux of Soler's anti-trust claim, the refusal to allow transshipment, and instead focus solely on the wrongful termination claim, the Court's suggestion that an arbitrator's decision may make it unnecessary to reach an anti-trust claim, is inconsistent with an earlier portion of the Court's decision.

After all, if an arbitrator's determination makes it unnecessary to hear an anti-trust claim, then the arbitrator has, for all practical purposes, decided that antitrust claim. This, of course, would infringe upon exclusive federal court anti-trust jurisdiction and undermine the Court of Appeals determination that "the nonarbitrability of antitrust issues is an American doctrine that is alive, well, justified both in its conception and in its application . . ." *supra* at 163. *See Big Apple Cookie Company* v. *Springwater Cookie Company,* 517 F.Supp. 367, 368-369 (S.D. Ohio, 1981):

> Underlying the permeation doctrine is the pertinent recognition of the exclusivity of federal court jurisdiction in the determination of antitrust claims. Thus, although an arbitrator's decision directly upon an antitrust claim can have no preclusive effect upon

the subsequent assertion of such claim in federal court (i.e. because the arbitrator would lack the competent jurisdiction necessary for that form of *res judicata*), there does exist a substantial danger that an arbitrator's decision on non-antitrust claims, within his jurisdiction, might indirectly infringe upon exclusive federal court antitrust jurisdiction by collaterally estopping relitigation of factual issues crucial to both the arbitrable (i.e., non-antitrust) claims and related antitrust matters. *See generally Overseas Motors, Inc.* v. *Import Motors Ltd., Inc.*, 375 F.Supp. 499, 518-24 (E.D. Mich. 1974), *aff'd* 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 304 (1975). It is this indirect harm to a party's right to have his antitrust claims fully and fairly heard, in the first instance, in the only forum of competent jurisdiction (i.e., federal court), which the permeation doctrine seeks to avoid."

It is therefore submitted that the remand instructions given by the Court of Appeals were erroneous and should be corrected by this Court.

Moreover, since the Court of Appeals determined that Soler's statutory claims under the Automobile Dealers Day in Court Act and the Puerto Rico Dealers Act had to be arbitrated, no determination was ever made with respect to whether these statutory claims "permeated" the claims Mitsubishi sought to arbitrate. Therefore, if this Court should hold that Soler's statutory claims are not within the scope of the arbitration clause, then a determination would have to be made, whether in view of that holding, arbitration should be stayed pending judicial resolution of these statutory claims.

III.

Since Soler never agreed to arbitrate anti-trust claims this Court need not address the issues raised in Mitsubishi's brief.

As set forth in Point I of this brief, it is submitted that the Court of Appeals erred in determining that Soler's anti-trust claims were encompassed within the limited arbitration clause included in the contract between the parties. Should this Court agree with Soler's position on this issue, there would, of course, be no need to address Mitsubishi's challenge to the principle enunciated in *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), that anti-trust claims are of a character inappropriate for arbitration.

Nevertheless, even should this Court disagree with Soler's position concerning the scope of the arbitration clause, it is submitted that the arguments raised by Mitsubishi are without merit.

A. The doctrine of *American Safety* is well reasoned, has been universally accepted and is consistent with the holdings of this Court.

The doctrine that anti-trust claims are of a character inappropriate for arbitration, as articulated in *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), is in accord with well settled principles of public policy laid down by this Court and has been adopted by every court that has been given the opportunity to embrace it. See, for example, *Applied Digital Technology Inc.* v. *Continental Casualty Company*, 576 F.2d 116 (7th Cir. 1978); *Big Apple Cookie Company* v. *Springwater*

Cookie Company, 517 F.Supp. 367 (S.D. Ohio 1981); *Cobb* v. *Lewis,* 488 F.2d 41 (5th Cir. 1974); *Hunt* v. *Mobil Oil Corp.,* 410 F.Supp. 10 (S.D.N.Y. 1975), *aff'd* 550 F.2d 68 (2d Cir.), *cert. denied* 434 U.S. 984 (1977); *Varo* v. *Comprehensive Designers, Inc.,* 504 F.2d 1103 (9th Cir. 1978); *A & E Plastic Pak Co.* v. *Monsanto Co.,* 396 F.2d 710 (9th Cir. 1968); *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.,* 431 F.Supp. 271 (E.D. Penn. 1977); *Helfenbein* v. *International Industries, Inc.,* 438 F.2d 1068 (8th Cir.) *cert.denied* 404 U.S. 872 (1971); *Power Replacements, Inc.* v. *Air Preheater Co.,* 426 F.2d 980 (9th Cir. 1970).

The reasons underlying the doctrine are three-fold and include (1) the broad range of public interests affected by private anti-trust claims, (2) the complexity of the evidence anti-trust cases usually involve, and (3) the questionable propriety of entrusting the decision of anti-trust issues to commercial arbitrators who are frequently drawn for their business expertise, when it is the business community generally that is regulated by the anti-trust laws. *Cobb* v. *Lewis,* 488 F.2d 41, 47 (5th Cir. 1974).

This Court has long recognized that for reasons of public policy, certain claims should not be referred to arbitration. See *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), where this Court held that a claim under Title VII of the Civil Rights Act could not be arbitrated. See also *U.S. Bulk Carriers Inc.* v. *Arguelles,* 400 U.S. 35 (1971) where this Court held that a statutory claim for seaman's wages survived the enactment of § 301 of the Labor Management Relations Act. See also this Court's determination in *Wilko* v. *Swan,* 346 U.S. 427 (1953), that the public policy considerations behind the nonwaiver provisions of the Securities Act predominated over those of the Federal Arbitration Act.

There can be little doubt that the public's interest in the judicial resolution of anti-trust claims stands on, at the very least, equal footing with the public's interest in the judicial enforcement of the aforementioned statutory claims. In fact, as this Court made clear in *United States* v. *Topco Associates Inc.,* 405 U.S. 596, 610 (1972), anti-trust laws enjoy a unique status in our system of jurisprudence.

It is therefore submitted that *American Safety* was correctly decided and the well established doctrine that anti-trust claims are of a character inappropriate for arbitration should be given a stamp of approval by this Court.

B. The decision of the Court of Appeals is not in conflict with this Court's decisions in *Scherk* and *The Bremen.*

In its brief, Mitsubishi argues that because the contract between the parties is purportedly a "truly international agreement" within the meaning of this Court's decision in *Scherk* v. *Alberto-Culver,* 417 U.S. 506 (1974), the Court of Appeals erred in refusing to order arbitration of Soler's anti-trust claims. Mitsubishi also contends that the decision below is in conflict with the decision of this Court in *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972). Neither of Mitsubishi's arguments, however, can withstand scrutiny.

At the outset it should be noted that *Scherk* did not concern an anti-trust claim and the unique policy considerations attendant thereto. This point was dealt with at length by the Court of Appeals. See, for example, the following portion of the decision: (PA 27)

Although it is true that an investor like Scherk who brings an action under the securities laws serves the public interest by policing the securities market, the securities laws are designed primarily to protect a fairly small "special interest" group: those investors in a particular security who read and are influenced by information in the company's prospectuses or financial reports. Antitrust laws, on the other hand, protect the general public by preserving a competitive atmosphere that keeps prices down in an entire industry or in a group of related industries. The strength of the public interest in private enforcement of antitrust laws is illustrated by the fact that successful antitrust plaintiffs are allowed to recover treble damages, while securities plaintiffs' may only recover their actual damages. *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth Inc.*, 723 F.2d 155, 168 (1st Cir. 1983).

In addition to the difference in policy considerations relevant to the securities laws and the anti-trust laws, there are substantial factual differences between the case at bar and the circumstances facing this Court in *Scherk*.

In *Scherk* the dispute between the parties had only a tangential relationship to the United States. This point was made clear by this Court when it noted that, "the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets," *supra* at 515, and further when the Court explained that the "only contact between the United States and the transaction involved here is the fact that Alberto-Culver is an

American corporation and the occurrence of some—but by no means the greater part-of the pre-contract negotiations [took place] in this country." *supra* at 517n.11.

In contrast, in the instant case the relationship of the dispute to the United States is substantial and direct. Not only has Mitsubishi chosen to expand its sales operations into the American marketplace, but it has restricted the sale of the vehicles in question solely to that market. In so doing, Mitsubishi must certainly have expected that its acts would be judged by the same standard as similarly situated domestic companies.

Indeed, it is worthy of note that the argument raised by Mitsubishi in the Court of Appeals; that since this is an "international contract" it should be permitted to compel arbitration of claims that would otherwise, in a domestic setting, not be arbitrable, is precisely the argument anticipated by the dissent in *Scherk*.

In that dissent, Justice Douglas joined by Justices Brennan, White and Marshall, warned that parties might through the invocation of the "international contract" talisman, seek to emasculate the securities regulations through the insertion of arbitration clauses requiring investors to vindicate their rights in foreign forums. *Scherk, supra* at 529. The dissent noted that the federal securities regulations:

> . . . are rendered a chimera when foreign corporations or funds—unlike domestic defendants—can nullify them by virtue of arbitration clauses which send defrauded American investors to the uncertainty of arbitration on foreign soil, or, if those investors cannot afford to arbitrate their claims in a far-off forum, to no remedy at all. *Scherk, supra* at 533.

It is submitted that the instant case demonstrates the foresight of the position taken by the dissent and provides this Court with an opportunity to clarify the parameters of the *Scherk* decision. After all, Mitsubishi, a foreign corporation, has chosen to reap the benefits of expansion into the American marketplace. It would be fundamentally unfair if, by virtue of the fact that it is a foreign corporation, it could compel arbitration of anti-trust claims, when similarly situated domestic corporations could not.

Finally, the decision of this Court in *The Bremen* would not dictate a result contrary to that arrived at by the Court of Appeals. Wholly aside from the fact that *The Bremen* did not concern an arbitration clause, but a forum selection clause, this Court made clear that its holding was limited to a "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . ." *supra* at 12. As demonstrated earlier in this brief, both Congress and the Puerto Rican Legislature have expressly stated that an agreement, such as the one in question, is the product of "overweening bargaining power." Consequently refusing to order Soler to arbitrate in Japan its anti-trust claims would not, in any way, be inconsistent with this Court's decision in *The Bremen*.

C. The Court of Appeals did not refuse to enforce a treaty of the United States.

Mitsubishi's final contention is that the Court of Appeals refused to enforce a treaty of the United States, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). This claim, is likewise, meritless.

Articles II (1) and (3) of the Convention provide:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, *concerning a subject matter capable of settlement by arbitration.* (emphasis added)
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In addition Article V (2) provides:

> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) *The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
>
> (b) *The recognition or enforcement of the award would be contrary to the public policy of that country.* (emphasis added)

It is thus apparent that the drafters of the Convention realized that there would be circumstances where signatory countries would either refuse to recognize an arbitration agreement or refuse to enforce an arbitral award, and thus drafted the Convention to allow for same in an

appropriate case. *Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth, Inc., supra* at 164-166.

It is submitted that this is such an appropriate case. The principle that anti-trust claims are of a character inappropriate for arbitration has been embedded in our system of jurisprudence for more than fifteen years. It can also be assumed that this doctrine has not gone unnoticed by Congress. Nevertheless, Congress has chosen not to act, and instead has allowed the doctrine to stand.

By reason thereof, the holding of the Court of Appeals "that an agreement to arbitrate antitrust issues is not 'an agreement within the meaning of' Article II(3) of the Convention because such an agreement does not concern 'a subject matter capable of settlement by arbitration', as required by Article II(1)," *supra* at 166, is in harmony with well established principles of public policy and the express provisions of the treaty. It should therefore be affirmed by this Court.

CONCLUSION

The decision of the Court of Appeals, insofar as it determined that Soler's statutory claims fell within the scope of the arbitration clause herein, was erroneous. The Court of Appeals also erred in its instructions remanding the case to the District Court. It is therefore submitted that the judgment of the Court of Appeals, insofar as it relates to these issues, be reversed, and the case remanded with proper instructions.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

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MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,
v.
SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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Restatement (Second) of Conflict of Laws 14-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 83-1569 and 83-1733

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,
v.
SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE COMMONWEALTH OF PUERTO RICO AS AMICUS CURIAE

The Commonwealth of Puerto Rico (hereafter the "Commonwealth") files this brief as Amicus Curiae pursuant to Rule 36.4 in the light of its interest, more fully set forth below, in the Puerto Rico Dealers' Act, Law No. 75 of June 24, 1964, as amended, 10 L.P.R.A. § 278 *et seq.* (hereafter "Law No. 75"), which was held by the lower courts to be preempted under the Supremacy Clause of the United States Constitution by the

Federal Arbitration Act, 9 U.S.C. §§ 1-14, 201-208 (hereafter the "Arbitration Act").[1]

INTEREST OF AMICUS CURIAE

Both the question presented in the petition filed by Mitsubishi Motors Corporation ("Mitsubishi") and the question raised in the cross-petition filed by Soler Chrysler-Plymouth, Inc. ("Soler"), focus upon the arbitrability of certain issues arising out of an arrangement whereby Soler sold vehicles in Puerto Rico that were manufactured by Mitsubishi in Japan. The "Sales Procedure Agreement" between Mitsubishi and Soler contains an arbitration clause fixing Japan as the venue for arbitration and another clause specifying the law of the Swiss Confederation as governing the contract.

Mitsubishi challenges the decision of the United States Court of Appeals for the First Circuit that Soler was not required to pursue its federal antitrust claims in the arbitration proceedings established by the Sales Procedure Agreement. Soler challenges the First Circuit's decision that it must submit its claims under Law No. 75, as well as those under the Commonwealth's antitrust laws and the Federal Dealer's Day in Court Act, 15 U.S.C. § 1221, *et seq.*, to such arbitration. Based upon the positions taken by the parties in the lower courts, as well as the arguments made in their submissions seeking the invocation of this Court's certiorari jurisdiction, it seems likely that they will address only the question of the arbitrability of the legal issues raised in this case and will ignore the Japanese venue, Swiss choice-of-law issues. Thus, the parties' arguments may lead this Court to believe, incorrectly, that these issues are necessarily subsumed in the arbitrability issue.

The venue and choice-of-law issues, although related to the arbitrability issue presented by Soler, require separate analysis. Section 3B of Law No. 75, 10 L.P.R.A. § 278b-2, proscribes any adjustment, arbitration, or litigation of dealer disputes,

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[1]The complete text of Law No. 75 is set forth in the Addendum to this brief at pages 1a - 4a.

such as the one between Mitsubishi and Soler, outside of Puerto Rico or under foreign law. The question whether this aspect of Law No. 75 is preempted by the Arbitration Act is of great significance to the Commonwealth and cannot be disposed of by a decision as to the general arbitrability of issues under Law No. 75.

The purpose of this Amicus Curiae brief is to ensure that the Court not decide the choice-of-venue/choice-of-law issues associated with Law No. 75, without adequate consideration of these issues. Should this Court deem it appropriate to address these issues, it should hold, pursuant to the argument set forth below, that the prescription of Commonwealth venue and Commonwealth law for the resolution of Law No. 75 issues is not preempted by the Arbitration Act.

SUMMARY OF ARGUMENT

Law No. 75 was enacted to protect Puerto Rican dealers from abusive practices by larger manufacturers or distributors by prohibiting manufacturers or distributors from severing their relationships with Puerto Rican dealers without just cause. 10 L.P.R.A. § 278a. To ensure that full force and effect is afforded to Law No. 75 in any resolution of a dealer dispute, the Legislature added to Law No. 75 a provision that invalidates, as contrary to public policy, any contractual provision that would require a dealer to adjust, arbitrate or litigate disputes outside of Puerto Rico or under non-Commonwealth law. 10 L.P.R.A. § 278b-2. The provisions of Law No. 75 represent a fundamental public policy of the Commonwealth. Given Puerto Rico's dependence on imported goods, particularly imported automobiles, the protection of dealers from unfair practices goes to the very foundations of the Puerto Rican economy and social life.

The Legislature's concern, reflected in Law No. 75, that choice-of-venue and choice-of-law clauses in a dealer's contract might serve to frustrate the purposes of the law are borne out by the facts of this case. If Soler is required to submit its Law

No. 75 claims to arbitrators in Japan under Swiss law — as the Sales Procedure Agreement requires — the protections afforded to it by Law No. 75 are likely to be illusory.

Federal courts, applying ordinary contract principles, would refuse to enforce the choice-of-venue and choice-of-law clauses of the Mitsubishi-Soler agreement and would instead give effect to Law No. 75. Choice-of-venue clauses are unenforceable where, as here, they contravene a strong public policy of the forum. *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Similarly, choice-of-law clauses are invalid in cases such as the present one, where they are repugnant to a fundamental public policy of the jurisdiction whose law would apply absent an effective choice by the contracting parties. *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953).

The provisions of Law No. 75 regarding choice-of-venue and choice-of-law are not preempted by the Arbitration Act. Those provisions apply neutrally to all methods of dispute resolution; they are not anti-arbitration provisions such as those found to be preempted in *Southland Corp.* v. *Keating*, ____ U.S. ____, 104 S. Ct. 852 (1984).

Under the preemption tests articulated by this Court, the Arbitration Act does not preempt State or Commonwealth laws regulating venue and choice-of-law. There is nothing in either Chapter 1, 9 U.S.C. §§ 1-14, or Chapter 2, 9 U.S.C. §§ 201-208, of the Arbitration Act that expressly or implicitly suggests that Congress intended to mandate enforcement of choice-of-forum or choice-of-law provisions relating to arbitration. On the contrary, the terms and legislative history of 9 U.S.C. § 206 make clear that Congress contemplated that in some cases it would be inappropriate to enforce the choice-of-forum clause in an arbitration agreement.

Thus, State or Commonwealth regulation of choice-of-law or choice-of-venue is not preempted, where, as in Law No. 75, that regulation reflects a fundamental public policy and applies neutrally to all methods of dispute resolution.

ARGUMENT

I. LAW NO. 75 EXPRESSES FUNDAMENTAL PUBLIC POLICY OF THE COMMONWEALTH.

A. Law No. 75 Protects Puerto Rican Dealers From Termination Without "Just Cause."

Law No. 75 was adopted by the Commonwealth in 1964. The principal provisions of the law that are relevant to the dispute between Mitsubishi and Soler are as follows:

Section 2 of Law No. 75, 10 L.P.R.A. § 278a, guarantees Puerto Rican dealers that their relationship with manufacturers cannot be terminated without "just cause":

> "Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause."

Section 1(d), 10 L.P.R.A. § 278(d), defines "just cause" as

> "nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service."[2]

Section 3 of Law No. 75, 10 L.P.R.A. § 278b, specifies the measure of damages to be used to compensate a dealer who has been terminated without just cause. It characterizes such termination as a "tortious act" entitling the dealer to indemnification based upon the following factors: (a) the dealer's expenditures in equipping itself to carry out its obligations; (b) its

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[2]Section 1(c) of Law No. 75 defines "principal or grantor" as a "person who executes a dealer's contract with a dealer."

unsold inventory; (c) loss of good will as measured by the number of years the dealer has been in business, sales volume, Puerto Rican market share, and other factors; and (d) five times average annual profits prior to termination.

Section 4 of Law No. 75, 10 L.P.R.A. § 278c, states that its provisions "are of a public order and therefore the rights determined by such provisions cannot be waived." Shortly after its enactment, the Federal District Court of Puerto Rico held that this provision did not bar the enforcement of Law No. 75 rights through an arbitration procedure. *Sumaza* v. *Cooperative Association*, 297 F. Supp. 345 (D.P.R. 1969). The Supreme Court of Puerto Rico subsequently held, however, that Section 4 could be invoked by a Puerto Rican dealer to invalidate its obligation to arbitrate disputes arising out of a dealer contract. *Walborg Corp.* v. *Superior Court*, 104 D.P.R. 184 (1975), 4 Official Translations of the Decisions of the Supreme Court of Puerto Rico [hereafter "O.T.P.R."] 258.[3]

Section 3B of Law No. 75, 10 L.P.R.A. § 278b-2, was adopted in 1978, following the *Walborg* decision. It provides:

> "The dealer's contracts referred to in this chapter shall be interpreted pursuant to and ruled by the laws of the Commonwealth of Puerto Rico, and any other stipulation to the contrary shall be void.
>
> "Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void."

Accordingly, whether or not Law No. 75 bars an arbitration process for the resolution of dealer contract disputes, it is clear that, following the 1978 Amendment, the law invalidates provi-

[3]The official translation of *Walborg Corp.* v. *Superior Court* is reproduced in the Addendum to this brief at pages 5a-12a.

sions in dealer's contracts specifying adjustment, arbitration or litigation of controversies "outside of Puerto Rico, or under foreign law or rule of law."

B. The Purposes of the 1964 Act.

The general purposes underlying Law No. 75 were made clear by the Commonwealth's Legislature at the time of its adoption. As quoted by the Puerto Rico Supreme Court in *Walborg*, the report of the committee concerned with the passage of Law No. 75 stated that:

> "The problem created in the system of distribution in Puerto Rico, has recently flared up by the unjust action of manufacturing enterprises, domestic and foreign that, without just cause, terminate the relationship with their dealers and agents in Puerto Rico, as soon as the latter have created a favorable market for their products . . . .
>
> "The traditional provisions which regulate contracts between private individuals have shown that they are not effective to protect the legitimate rights of the dealer or agent, for which reason it is necessary to legislate to regulate this relationship and warrant that the manufacturers act in good faith, equitatively, and in no arbitrary manner . . . ." 104 D.P.R. at 188-89, 4 O.T.P.R. at 264, Addendum at 7a-8a.

In terms which anticipated the relationship established between Mitsubishi and Soler in this case, see pp. 10-11 below, the legislative committee found that:

> "Normally the contract of distribution or agency is drafted by the manufacturer, with clauses which are favorable to him, and a provision to the effect that the relationship may be terminated by any of the parties, upon advance notice of 60 or 90 days. The distributor or agent dedicates himself to the creation of a market for the product he represents and, when he begins to derive benefit from the business, once the market has been established, the manufacturer realizes that from an econom-

ic point of view he is better off by establishing his own sales office or branch, and unjustly terminates the relationship without compensating equitably the efforts made by the distributor or agent." 18 Diario de Sesiones, Part 3, 1531; 2 Servicio Legislativo de Puerto Rico, No. 4, pp. 630-631 (1964) (attorney's translation).

On the basis of these committee sentiments regarding Law No. 75, the legislature adopted the following Statement of Motives to accompany the statute:

> "The Commonwealth of Puerto Rico cannot remain indifferent before the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaires, or agents . . . as soon as said dealers, concessionaires, or agents have created a favorable market and without taking into account their legitimate interests.
>
> "The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest, and to the general welfare . . . ." *Quoted in Walborg*, 104 D.P.R. at 189, 4 O.T.P.R. at 265, Addendum at 8a.

Thus, as the Puerto Rico Supreme Court declared in *Walborg*,

> "Act No. 75 unquestionably represents a strong public policy directed to level the contractual conditions between two groups financially unequal in their strength." *Id.*

Similarly, the federal courts have recognized that Law No. 75 was approved to curb widespread abuse by principals in dealing with their franchised dealers. *Southern International Sales Co., Inc.* v. *Potter & Brumfield Div.*, 410 F. Supp. 1339, 1341-42 (S.D.N.Y. 1976); *Ruiz* v. *Economics Laboratory, Inc.*, 274 F. Supp. 14, 16-17 (D.P.R. 1967). Thus, Law No. 75 has been recognized as being "part of a broad evolutionary antitrust program." 274 F. Supp. at 18.

C. The Purpose of the 1978 Amendments

As noted above, Section 3B of Law No. 75, 10 L.P.R.A. § 278b-2 — which declares void as contrary to public policy any provision in a dealer's contract requiring adjustment, arbitration or litigation outside of Puerto Rico or under non-Commonwealth law — was added in 1978. The Report of the Commission of Industry, Commerce and Industrial Promotions of the Commonwealth Senate explained that

> "[t]he bill addresses the situation of great disadvantage in which the distributor is often placed by reason of the inclusion in the distribution contract of certain clauses that obligate him to settle his controversies and to claim his rights in foreign fora and under foreign law. The [bill] declares those clauses null and void. . . ." Servicio Legislativo de Puerto Rico, 8a. Asamblea, 2a. Sesion Ordinaria, Volume 16, 444, 445 (1978) (attorney's translation).

There are special circumstances which give added emphasis to the concerns expressed by the Commonwealth through Law No. 75. First, Puerto Rico's insular nature and great distance from most of the manufactures upon which its dealers depend make them especially vulnerable to contractual provisions requiring that disputes be decided at the situs of the manufacturer.

Second, the vast majority of the durable goods sold in Puerto Rico are imported.[4] Furthermore, since there is no effective mass transportation system on the island, the distribution of automobiles has a direct and strong impact on the Commonwealth economy and general welfare. Thus, protection of deal-

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[4] During the fiscal year ending June 30, 1984, Puerto Rico's total imports were $8,506,800,000. This constituted more than two thirds of Puerto Rico's $12,970,700,000 share of the Gross National Product. During that year, Puerto Rico imported $798,500,000 in consumer durables, of which $174,442,000 (25%) were U.S.-produced automobiles and $392,259,000 (49%) were foreign automobile imports, mostly from Japan. *Source:* 1985 *Draft Report to Governor*, Preliminary Statistics, Commonwealth of Puerto Rico Planning Board.

ers and distributors from abusive practices by manufacturers with greater bargaining power is a matter of special concern to Puerto Rico. In protecting dealers from unfair practices, the legislature protected the very foundations of the economic and social life of the Commonwealth.

Finally, as this Court has recognized, Puerto Rico is "a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition." *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 (1970). The substantive guarantees of Law No. 75, which arise out of that tradition, are at special risk when adjudicated by judges or arbitrators steeped in the Anglo-Saxon tradition or, even worse, as in this case, grounded in the jurisprudence of the Orient. This Court's recognition that federal courts acting "in the Anglo-Saxon tradition, which often left little room for the overtones of Spanish culture" when dealing with Commonwealth law, 400 U.S. at 43, thus further substantiates the Commonwealth's public policy concern with choice-of-venue and choice-of-law reflected in Law No. 75.

II. The Facts of the Mitsubishi-Soler Dispute Illustrate the Reasons for Concern with Choice of Venue and Choice of Law Reflected in Law No. 75.

The arbitration clause at issue in this case, Article VI of the Sales Procedure Agreement, provides in pertinent part:

> "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or of the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." (JA 52-53).

Article XIV of the agreement specifies that it "will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." (JA 56).

Thus, if Soler is obligated to arbitrate its claims under Law No. 75 in precisely the manner described in the agreement, it

will be forced to incur the vast expenses entailed by traveling more than 8,000 miles to Japan, where Mitsubishi has its corporate headquarters, and bringing with it requisite attorneys, witnesses and other evidence. Moreover, it will be required to ask a Japanese tribunal, applying Swiss law, to give full force and effect to the special provisions of Law No. 75 in determining whether there was "just cause" for Mitsubishi's termination of Soler's dealership and, if not, in determining the amount of damages under Law No. 75 which Soler is owed.

The rules of the Japanese Commercial Arbitration Association, which are specified in the arbitration clause, further highlight the severe prejudice that Soler would face in prosecuting its Law No. 75 claims pursuant to the precise terms of the arbitration clause. Those rules provide, as the contract itself does, that all arbitration must be conducted in Japan. (JA 215, 227). Although the rules on their face permit non-Japanese nationals to serve on the arbitration panel (JA 215-217), they also require that all arbitrators reside in Japan, unless both parties agree otherwise. (JA 216). Every document submitted regarding the dispute must be translated into Japanese, unless the tribunal rules otherwise. (JA 222-223). Final awards are rendered in Japanese, although upon demand they may be translated into English, but not Spanish. (JA 222).[5]

There can be little doubt that a Puerto Rican auto dealer, like Soler, will be severely prejudiced in its assertion of Law No. 75 claims — in precisely the manner envisioned by the Commonwealth Legislature — when confronting Mitsubishi before a panel of Japanese-resident arbitrators sitting in Japan and applying Swiss law.

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[5]Translation of legal materials into and from Japanese often present special problems, which require not only the services of a skilled translator but also the opinion of a bilingual attorney. In this case, for example, it might be necessary for Soler to hire Japanese counsel fluent in English and/or Spanish to certify that the translator has correctly expressed the legal conclusions of the arbitration panel when it renders its final award.

III. Federal Courts Applying Ordinary Contract Principles Would Not Enforce the Choice-of-Venue and Choice-of-Law Provisions of the Agreement in This Case, But Would Instead Give Effect to Law No. 75.

A. Courts Are Not Bound to Enforce Contractual Choice-of-Venue Provisions that Are Contrary to Public Policy.

This Court spoke at length about contractual choice-of-forum provisions in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), when it upheld a contract clause specifying a neutral United Kingdom forum to resolve disputes between a United States drilling-rig operator and a German towing company. The Court's reasons for doing so, however, reveal that it would have reached a different result, if confronted with the type of contract negotiated between Mitsubishi and Soler in this case:

> "Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen . . . ." 407 U.S. at 11-12.

On this basis, the Court found that there were:

> "[c]ompelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." 407 U.S. at 12-13 (footnote omitted).

In so holding, however, the Court by no means indicated that it would shut its eyes to the realities of an unequal bargaining situation or to public policy considerations in dealing with

choice-of-forum clauses in contracts. To the contrary, the Court recognized that:

> "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." 407 U.S. at 15.

The public policy expressed in Law No. 75 regarding the difficulty and inconvenience of Puerto Rican dealers litigating their claims in distant venues, such as Japan, unquestionably is the type of "strong public policy" that the Court had in mind in *Zapata* for invalidating choice-of-forum clauses in contracts. *See* 407 U.S. at 15, citing *Boyd* v. *Grand Trunk Western R.R.*, 338 U.S. 263 (1949), which invalidated a limitation of forum clause in a partial settlement agreement as inconsistent with the underlying federal statute upon which the claim was based.

Moreover, in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), this Court recognized that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." In there upholding an agreement specifying arbitration abroad, the Court relied upon *Zapata*. 417 U.S. at 518-19. *Zapata*, while generally sustaining choice-of-forum provisions, also articulated the limits that courts should observe in order to protect the public policy of the forum.

Following this Court's decision in *Zapata*, a number of lower federal courts have invalidated choice-of-forum clauses in circumstances very similar to those presented in this case. *See, e.g., Copperweld Steel Co.* v. *Demag-Mannemann-Bohler*, 578 F.2d 953 (3d Cir. 1978) (invalidated a Germany forum clause when most dealings were within United States); *Horning* v. *Sycom*, 556 F. Supp. 819 (E.D. Ky. 1983) (invalidated a Wisconsin forum clause in a contract drafted by Wisconsin seller-manufacturer); *Cutter* v. *Scott & Fetzer Co.*, 510 F. Supp. 905 (E.D. Wisc. 1981) (invalidated an Ohio forum clause in dispute

under Wisconsin Fair Dealership Law, which required "good cause" for termination of the dealership, on the ground that Ohio judges would be unfamiliar with the Wisconsin statute).

B. Courts Are Not Bound to Enforce Contractual Choice-of-Law Provisions that Are Contrary to Public Policy.

The general rule governing the enforceability of contractual choice-of-law clauses was laid down by this Court in *Lauritzen* v. *Larsen*, 345 U.S. 571, 588-89 (1953):

> "[E]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."

In that case, the Court could discern no public policy that invalidated the choice of law made by the parties — the law of the flag-state in a maritime contract. But the Court cautioned that

> "a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship." 345 U.S. at 589.

A modern and widely accepted expression of the rule articulated in *Lauritzen* v. *Larsen* can be found in Section 187(2) of the Restatement (Second) of Conflict of Laws (the "Restatement"). This section calls for the application of the law chosen by the parties unless

> "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

Section 188(1) of the Restatement, in turn, calls for the application of "the local law of the state which, with respect to that

issue, has the most significant relationship to the transaction and the parties. . . ."[8]

These principles have been consistently followed by lower federal courts. *See, e.g., Barnes Group, Inc.* v. *C&C Products, Inc.*, 716 F.2d 1023, 1029-32 (4th Cir. 1983); *Foreman* v. *George Foreman Associates, Ltd.*, 517 F.2d 354, 356-57 (9th Cir. 1975); *Pan American Computer Corp.* v. *Data General Corp.*, 467 F. Supp. 969, 970 (D.P.R. 1979); *Southern International Sales Co., Inc.* v. *Potter & Brumfield Div.*, 410 F. Supp. 1339, 1342 (S.D. N.Y. 1976).

Two of these cases involved Law No. 75. In *Southern International Sales Co., Inc.* v. *Potter & Brumfield Div.*, 410 F. Supp. 1339, the court refused to enforce a choice-of-law clause in a dealers' contract to be performed in Puerto Rico, on the ground that applying the chosen law would frustrate the fundamental policy expressed in Law No. 75. The court noted that

> "[t]his strong legislative policy could easily be circumvented were the court to allow a manufacturer, by wielding its economic might against a distributor, to exact a stipulation as to governing law compelling the distributor to forsake the protection afforded him by the Puerto Rican legislature." *Id.* at 1342.

Accordingly, the court held that the case fell within the public-policy exception of section 187(2) of the Restatement. A similar

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[8] Section 10 of the Restatement recites that the rules of the Restatement apply to intra-national conflict-of-law cases and are also "generally applicable to cases with elements in one or more foreign nations." As recognized in Comment *d* to § 10 "[w]ithin the United States, there are safeguards under the Constitution of the United States, such as the due process clause of the Fourteenth Amendment, which give a large measure of legal assurance of fairness of official action within each State." The Comment adds that "[t]he lack of such safeguards in an international conflicts case may call for closer scrutiny or different treatment." It is clear, then, that if a fundamental public policy of the Commonwealth would under the Restatement invalidate a contractual choice-of-law clause that referred to the law of one of the fifty States, it would also invalidate, *a fortiori*, a choice of foreign law.

result was reached, on virtually identical facts, in *Pan American Computer Corp.* v. *Data General Corp.*, 467 F. Supp. 969.

Like *Southern International* and *Pan American Computer*, the instant case unquestionably falls within the public-policy exception articulated in *Lauritzen* v. *Larsen*, and section 187(2) of the Restatement. First, the application of Swiss law in this case would be contrary to a fundamental public policy of the Commonwealth expressed in Law. No. 75.[7] Second, Commonwealth law would apply under section 188 of the Restatement, in the absence of an effective choice by the parties, since Puerto Rico is the place where Soler had its domicile and where the greatest part of the contract was to be performed (JA 42). Third, given the importance of dealers' contracts in the Commonwealth economy (*supra*, pp. 7-10) and the public policy articulated by Law No. 75, the Commonwealth's interest in the determination of issues related to the termination of Soler is incomparably greater than any interest Switzerland may have in the resolution of those issues, *see* Restatement, § 6(2)(c) & § 188.

IV. The Provisions of Law No. 75 Bearing Upon Choice of Venue and Choice of Law Are Not Preempted by the Arbitration Act.

Having shown that the provisions of Law No. 75 regarding choice-of-forum and choice-of-law clauses in dealer contracts would be enforced by courts in cases where dealer disputes are litigated in court, the remaining issue is whether Congress through adoption of the Arbitration Act invalidated those provisions as applied to contracts where the parties have specified arbitration as the method for resolving such disputes. As we will now show, nothing in the prior decisions of this Court, general preemption principles, or the terms and legislative history of the Arbitration Act suggests that Congress intended

[7]Comment *g* to section 187 of the Restatement explains that "a fundamental policy may be embodied in a statute which . . . is designed to protect a person against the oppressive use of superior bargaining power." This is indeed the main purpose of Law No. 75.

to preempt State law regarding choice of forum or choice of law for arbitrable disputes.

A. *Southland Corp.* v. *Keating* Did Not Decide the Issues in this Case.

In *Southland Corp.* v. *Keating*, ____ U.S. ____, 104 S. Ct. 852 (1984), this Court held that the Arbitration Act preempted California law, insofar as it invalidated all aspects of arbitration agreements set forth in contracts between California franchisees and their franchisors. *Keating* did not address the issues briefed by the Commonwealth here.

The provision of Law No. 75 here at issue, 10 L.P.R.A. § 278b-2, pertains to all adjustment, arbitration, or litigation of claims regarding dealer contracts. Rather than proscribing arbitration as a process or placing special limitations upon it, this section of Law No. 75 specifies instead that any resolution of claims must take place in Puerto Rico and must be governed by Commonwealth law. Section 278b-2 is not an anti-arbitration provision, like the California statute which this Court had before it in *Keating*.[8]

[8]*Walborg* v. *Superior Court*, 104 D.P.R. 184, 4 O.T.P.R. 258, Addendum 5a - 12a, did construe Section 4 of Law No. 75, 10 L.P.R.A. § 278c, which states that rights under Law No. 75 may not be waived, as being an anti-arbitration provision similar to the one before the Court in *Keating*. The *Walborg* court, following a rationale comparable to that of the California Court in *Keating*, held that the Arbitration Act did not preempt § 278c in a suit instituted in Puerto Rican courts. In the light of its conclusion that the Arbitration Act did not apply to non-federal litigation, the Puerto Rican Supreme Court found it unnecessary "to examine the impact on this case of the special relations between Puerto Rico and the United States" as a further basis for rejecting the argument that the Arbitration Act preempted this aspect of Law No. 75. 104 D.P.R. at 192, 4 O.T.P.R. at 268, Addendum at 11a.

The Puerto Rican Supreme Court has not had the opportunity to reconsider *Walborg* in the light of this Court's decision in *Keating*. We are thus left to speculate whether it would continue to construe § 278c as a general anti-arbitration provision. The reservations that this Court expressed in *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, regarding adjudication of constitutional issues under Law No. 75, prior to the Supreme Court of Puerto Rico's opportunity to construe that law, lead us to reserve the question whether, notwithstanding *Keating*, the "special relations between Puerto Rico and the United States" permit Section 278c of Law No. 75 to be construed as an anti-arbitration provision.

This Court's opinion in *Keating* reveals that its finding of preemption of the California statute was based entirely upon a construction of the Arbitration Act as implementing a national policy favoring the arbitration process as an alternative to judicial resolution of disputes:

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 104 S. Ct. at 858.

As the Court noted, the legislative history of the Arbitration Act revealed that it was necessary to overcome the hostility that courts, at least in the past, had shown for the arbitration process:

> "[T]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction . . . This jealousy survived for so lon[g] a period that the principle became firmly imbedded in the English common law and was adopted with it by the American courts." 104 Sup. Ct. at 859, quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

Thus, it is clear that *Keating* rested upon an interpretation of the Arbitration Act as the expression of a strong national policy encouraging the resolution of disputes by the arbitration process. Nothing in *Keating* addresses the venue and choice-of-law issues that the Commonwealth raises here.

B. The Provisions of Law No. 75 Relating to Choice of Venue and Choice of Law for the Resolution of Dealer Contract Disputes Are Not Preempted Unless Congress Has Clearly Expressed Its Intention To Do So.

This Court most recently articulated the general principles of preemption analyses in *Capital Cities Cable, Inc.* v. *Crisp*, ___ U.S. ____, 104 S. Ct. 2694, 2700 (1984):

> "Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby 'left no room for the States to supplement' federal law; and, finally, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (citations omitted).

This Court also cautioned in *Chicago & N.W.RR.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), that

> "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). See *De Cannas* v. *Bica*, 424 U.S. 351, 356 (1976)."

Accordingly, in resolving the issues raised here, this Court must examine the Arbitration Act to determine whether Congress has, in the words of *Crisp*, "expressed a clear intent" or, in the words of *Kalo Brick*, "unmistakably" preempted state law with respect to choice-of-forum and choice-of-law issues in the arbitration process. Alternatively, it must determine whether Law No. 75 "stands as an obstacle" to the accomplishment of Congress' purposes in adopting the Arbitration Act.

In undertaking this task, Justice Stevens' observations in his separate opinion in *Southland Corp.* v. *Keating*, 104 S. Ct. at 862, are particularly noteworthy:

"Moreover, even where a federal statute does displace State authority, it 'rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose.' P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470-471 (2d ed. 1973).

"The limited objective of the Federal Arbitration Act was to abrogate the general common law rule against specific enforcement of arbitration agreements, S. Rep. No. 536, 68th Cong., 1st Sess., 2-3 (1924), and a state statute which merely codified the general common law rule — either directly by employing the prior doctrine of revocability or indirectly by declaring all such agreements void — would be preempted by the Act. However, beyond this conclusion, which seems compelled by the language of § 2 and case law concerning the Act, it is by no means clear that Congress intended entirely to displace State authority in this field."

Although Justice Stevens' views were not followed by the Court to the extent that they would have left standing the anti-arbitration provision of the California Franchise Law, they continue to give sound guidance as to the preemption principles to be applied in deciding whether the States have been preempted on issues, such as venue and choice of law, for an arbitration process.

C. The Arbitration Act Does Not Preempt State or Commonwealth Law Regarding Venue or Choice of Law for Arbitration.

1. Chapter 1 of the Arbitration Act Does Not Preempt State or Commonwealth Law Regarding Choice of Venue and Choice of Law.

In resolving preemption issues, as in other questions of statutory interpretation, this Court's analysis begins with the

plain meaning of the language of the statute.[9] Section 2 of Chapter 1 of the Arbitration Act, 9 U.S.C. § 2, which was held in *Keating* to preempt State anti-arbitration laws, provides as follows:

> "A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable upon such grounds as exist at law or in equity for the revocation of any contract."

Section 2 of the Act defines two types of arbitration provisions which the Act declares "valid, irrevocable, and enforceable." Here, we deal with a written provision "to settle by arbitration" subsequent controversies arising out of the contract or out of a refusal to perform the contract in whole or in part.

The Commonwealth does not in this brief contest Soler's obligation "to settle by arbitration" its dispute with Mitsubishi regarding the termination of its dealership. Instead, we deal here with ancillary questions — choice of venue and choice of law — associated with arbitration. Section 2 of the Arbitration Act does not mandate enforcement of contract provisions regarding such ancillary questions.

To the contrary, the "savings clause" of Section 2 — agreements to arbitrate shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" — strongly suggests that choice-of-venue and choice-of-law provisions pertaining to arbitration arrangements may be invalidated in contracts prescribing ar-

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[9] *See, Bowsher* v. *Merck & Co.*, ____ U.S. ____, 103 S. Ct. 1587, 1591-92 (1983); *CBS* v. *FCC*, 453 U.S. 367, 377-79 (1981); *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 508 (1981).

bitration to the same extent that they may be invalidated in "any contract." As we have shown in Part III above, choice-of-venue and choice-of-law provisions in contracts are generally revocable when, as here, they contravene explicit policies of the forum. Thus, Section 2 of the Arbitration Act does not evidence an intention by Congress to preempt state law provisions, such as those contained in Section 278b-2 of Law No. 75.[10]

Section 5 of the Arbitration Act, 9 U.S.C. § 5, is the only provision of that law which relates to enforcement of a particular method of conducting arbitration. It provides that the method of naming arbitrators specified in the contract should be followed.[11] No provision of the Arbitration Act addresses the

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[10]On its face, the savings clause of Section 2 of the Arbitration Act could be construed as permitting the general invalidation of arbitration clauses on the basis of state public policy, since "any contract" which conflicts with public policy is generally unenforceable. This Court in *Keating* rejected this reading of the savings clause. *See* 104 S. Ct. at 863 (Justice Stevens' separate opinion). *Keating*, however, by no means holds that state public policies that relate to aspects of an arbitration clause, other than the promise to arbitrate itself, fall outside the scope of the savings clause. All of the purposes of Section 2 are served by construing the savings clause as preserving those State public policies that apply generally to "any contract," such as policies relating to choice of venue or choice of law, and do not discriminate between those contracts that contain arbitration clauses and those that do not. *See* Note, *State Law under the Federal Arbitration Act*, 78 Mich. L. Rev. 1391, 1400-02 (1980).

[11]The Mitsubishi-Soler contract specifies that arbitration shall be conducted "in accordance with the rules and regulations of the Japanese Commercial Arbitration Association." Those rules require both that arbitration be conducted in Japan and that Japanese residents be used as arbitrators. (*See* p. 11, *supra*). Since the application of the venue provisions of Law No. 75 require that arbitration be conducted in Puerto Rico, it is unclear whether the rules of the Japanese Commercial Arbitration Association can be applied as the method of naming the arbitrators. If not, Section 5 of the Arbitration Act empowers the federal district court to name alternative arbitrators:

> "[I]f no method [for naming arbitrators] be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators . . . then upon the application of either party . . . the court shall designate an arbitrator or arbitrators. . . ." 9 U.S.C. § 5.

question of the enforceability of choice-of-venue or choice-of-law provisions relating to an arbitration clause in a contract.[12]

Thus, it cannot be said that the Act expresses a "clear" or "unmistakable" intent by Congress to preempt State law concerning choice-of-venue or choice-of-law, or that Congress' basic purpose underlying the Arbitration Act would be frustrated by enforcement of Section 278b-2 of Law No. 75.

2. Chapter 2 of the Arbitration Act Does Not Preempt State or Commonwealth Law Regarding Choice of Venue and Choice of Law.

In 1970, the United States acceded to the Convention on Recognition and Enforcement of Foreign Arbitral Awards, and Congress amended the Arbitration Act to provide for the domestic implementation of the treaty. In the 1970 amendments, which became Chapter 2 of the Arbitration Act, 9 U.S.C. § § 201-208, Congress expressly addressed the enforceability of a contractual choice of venue for an arbitration proceeding.

As noted, the original Arbitration Act had not dealt with this issue. One of its provisions, however, mandated judicial enforcement of arbitration awards by "the United States Court in and for the District within which such award was made." 9 U.S.C. § 9. This provision suggested that federal courts could only enforce arbitral awards made in the United States. To clarify the matter, Congress adopted 9 U.S.C. § 206, which provides as follows:

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[12]Sections 3 & 4 of the Arbitration Act, 9 U.S.C. §§ 3 & 4, do provide for "order[s] directing the parties to proceed to arbitration in accordance with the terms of the agreement." In *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968), the court, exercising authority under Section 3 of the Act, ordered arbitration under a Puerto Rican dealer contract outside of Puerto Rico under Connecticut law. However, *Hilti* was decided prior to the enactment of Section 278b-2, and the court recognized that its result might be affected by a more specific statutory statement of Commonwealth public policy regarding venue and choice of law. 392 F.2d at 373. Equally important, *Hilti* was decided before enactment of Chapter 2 of the Arbitration Act, which, as we show below, pp. 24-26, recognizes that venue provisions in arbitration clauses need not be enforced.

> "A court having jurisdiction under this chapter *may* direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." (Emphasis supplied.)

The purpose of Section 206 was explained by Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, in testimony given at Senate hearings on the 1970 Amendments:

> "Because we are dealing solely with foreign commerce it appears very likely that many of the arbitration agreements falling under the Convention will provide for arbitration outside the United States. . . . The uniform Arbitration Act provides that the district court may direct 'the parties to proceed with the arbitration in accordance with the terms thereof.' However, in this area the case law is not clear whether the district court will order an arbitration to be held outside the United States. To clarify this issue, section 206 specifically provides that the district court may order the arbitration held at the place provided in a contract 'whether that place is within or without the United States.'"

S. Rep. No. 91-702, 91st Cong., 2d Sess. 7-8 (1970).

In addressing this issue through Section 206 and clarifying the authority of district courts to enforce the selection of a foreign venue under the Convention, Congress was careful not to require them to do so. The analysis of the bill set forth in both the House and Senate Reports made it clear that the use of the phrase "may direct" in Section 206 only "permits a court to direct that arbitration be held" abroad. *Id.* at 2; H.R. Rep. No. 91-1181, 91st Cong., 2d Sess. at 2 (1970).

This permissive language was drafted by the Department of State to implement its view that courts should retain discretion not to enforce a choice-of-venue provision in an arbitration agreement:

> "Section 106 [sic; 206] permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, section 206 is permissive rather than mandatory."

H.R. Rep. No. 91-1181 at 4 (letter from H. B. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, to Speaker of the House of Representatives John W. McCormack).[13] Since Mr. Torbert's letter was written to explain draft legislation prepared by the Department of State to implement the Convention, his views regarding the operation of Section 206, which in any event conform to the plain language of that section, are entitled to great weight.

In the light of the explicit terms of Section 206 and its unambiguous legislative history, it is perfectly clear that Congress has not mandated enforcement of all choice-of-venue provisions in arbitration clauses. It has instead recognized that there may be reasons of public policy which would make it inappropriate for a court to mandate the venue described in an arbitration agreement.[14]

Since the 1970 Amendments to the Arbitration Act clearly preserved the discretion of federal courts not to enforce choice-of-venue provisions in arbitration clauses, there is no reason to believe that Congress deprived the courts of the comparable discretion that they ordinarily have regarding choice of law, nor is there any reason to believe that Congress disabled State

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[13] *See also*, 115 Cong. Rec. 40,141 (1969), reciting the same representations made by Mr. Torbert to the Senate in a letter to Vice President Agnew.

[14] *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 185 (1st Cir. 1982), purported to decide whether Law No. 75 claims could be forced to arbitration in Italy under Chapter 2 of the Arbitration Act. However, the court dealt with this issue as though it involved a general question of arbitrability. There was no discussion by the Court of the terms of Section 206 or its legislative history.

legislatures from defining the public policy concerns that bear upon this issue.[15]

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[15]This brief has addressed only the question of preemption and has shown that Congress did not invalidate Section 278b-2 of Law No. 75 regarding choice of venue and choice of law. Assuming the Court agrees with our argument, Commonwealth courts can continue to apply Section 278b-2 to invalidate venue and choice-of-law provisions in dealer contracts giving rise to Law No. 75 disputes.

A somewhat different issue arises when federal courts are asked to enforce arbitration clauses. Under one view, they apply federal common law in this context, *Southland Corp.* v. *Keating*, 104 S. Ct. at 862 (Justice Stevens, separate opinion); *Acevedo Maldonado* v. *PPG Industries, Inc.*, 514 F.2d 614, 616 (1st Cir. 1975), but may look to those aspects of State law not preempted by the Arbitration Act to fashion such federal common law, *Keating*, 104 S. Ct. at 863 (Justice Stevens, separate opinion); *Comprehensive Merchandising Catalogs* v. *Madison Sales Corp.*, 521 F.2d 1210 (7th Cir. 1975). Under another view, federal courts directly apply those aspects of State law that are not preempted by the Arbitration Act. *Southeastern Enameling Corp.* v. *General Bronze Corp.*, 434 F.2d 330 (5th Cir. 1970); Note, *State Law under the Federal Arbitration Act*, 78 Mich. L. Rev. 1391 (1980). Under either view, the venue and choice-of-law provisions of Law No. 75, Section 278b-2, are available to federal courts exercising jurisdiction under the Arbitration Act in determining whether to enforce a non-Puerto Rican venue or choice-of-law provision in a dealer contract that contains an arbitration clause.

CONCLUSION

For the reasons stated above, this Court in addressing the issues raised in this case should not hold or imply that Law No. 75 is preempted by federal law, insofar as it pertains to the choice-of-venue and choice-of-law provisions associated with arbitration clauses.

Respectfully submitted,

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APPENDIX

ADDENDUM

The Puerto Rico Dealers' Act, Law No. 75 of June 24, 1964, as amended June 23, 1978, 10 L.P.R.A. §§ 278 et seq.

Section 1, 10 L.P.R.A. § 278.

Definitions

For the purposes of this chapter, the following terms shall have the meanings expressed below, save when the context clearly indicates otherwise:

(a) Dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service;

(b) Dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

(c) Principal or grantor: person who executes a dealer's contract with a dealer;

(d) Just cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service.

Section 2, 10 L.P.R.A. § 278a.

Termination of relationship

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established

relationship or refuse to renew said contract on its normal expiration, except for just cause.

Section 3, 10 L.P.R.A. § 278b.

Damages

If no just cause exists for the termination of the dealer's contract for detriment to the established relationship, or for the refusal to renew same, the principal shall have executed a tortious act against the dealer and shall indemnify it to the extent of the damages caused him, the amount of such indemnity to be fixed on the basis of the following factors:

(a) the actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged;

(b) the cost of the goods, parts, pieces, accessories and utensils that the dealer may have in stock, and from whose sale or exploitation he is unable to benefit;

(c) the good will of the business, or such part thereof attributable to the distribution of the merchandise or to the rendering of the pertinent services, said good will to be determined by taking into consideration the following factors:

(1) number of years the dealer has had charge of the distribution;

(2) actual volume of the distribution of the merchandise or the rendering of the pertinent services and the proportion it represents in the dealer's business;

(3) proportion of the Puerto Rican market said volume represents;

(4) any other factor that may help establish equitably the amount of said good will;

(d) the amount of the profit obtained in the distribution of the merchandise or in the rendering of the services, as the case may be, during the last five years, or if less than five, five times the average of the annual profit obtained during the last years, whatever they may be.

Section 3A, 10 L.P.R.A. § 278b-1.

Provisional remedy

In any litigation in which there is directly or indirectly involved the termination of a dealer's contract or any act in prejudice of the relation established between the principal or grantor and the dealer, the Court may grant, during the time the litigation is pending solution, any provisional remedy or measure of an interdictory nature to do or to desist from doing, ordering any of the parties, or both, to continue, in all its terms, the relation established by the dealer's contract, and/or to abstain from performing any act or any omission in prejudice thereof. In any case in which the provisional remedy herein provided is requested, the Court shall consider the interests of all parties concerned and the purposes of the public policy contained in this chapter.

Section 3B, 10 L.P.R.A. § 278b-2.

Interpretation pursuant to laws of the Commonwealth

The dealer's contracts referred to in this chapter shall be interpreted pursuant to and ruled by the laws of the Commonwealth of Puerto Rico, and any other stipulation to the contrary shall be void.

Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be likewise considered as violating the public policy set forth by this chapter and is therefore null and void.

Section 4, 10 L.P.R.A. § 278c.

Waiver of provisions

The provisions of this chapter are of a public order and therefore the rights determined by such provisions cannot be waived. This chapter being of a remedial character, should, for the most effective protection of such rights, be liberally interpreted; in the adjudgment of the claims that may arise hereunder, the courts of justice shall recognize the right in favor of whom may, effectively, have at his charge the distribution of activities, notwithstanding the corporate or contractual structures or mechanisms that the principal or grantor may have created or imposed to conceal the real nature of the relationship established.

Section 5, 10 L.P.R.A. § 278d.

Prescription of actions

Every action arising from this chapter shall prescribe in three years reckoning from the date of the definite termination of the dealer's contract, or of the performing of the detrimental acts, as the case may be.

IN THE SUPREME COURT OF PUERTO RICO

Walborg Corporation,

Petitioner

v. No. 0-75-278

Superior Court of Puerto Rico, San Juan Part, Luis V. Castro, Judge,

Respondent

Order of the Superior Court, San Juan Part, Luis V. Castro, Judge

Certiorari

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, September 30, 1975

Mr. José A. Vigo agreed in 1969 to undertake the distribution of the Walborg Corporation products in Puerto Rico. In August 1974 the dealer filed a complaint before the Superior Court by reason of the unilateral termination of the contract by Walborg in violation of the provisions of Act No. 75 of June 24, 1964, 10 L.P.R.A. § 278 *et seq*. Walborg requested the dismissal of the action, alleging that the controversy should be submitted to arbitration according to provisions of the agreement between the parties.

The dealer's contract, represented by a letter which Walborg sent to Mr. Vigo and which the latter endorses, contained the following clauses:

> ". . . this contract is made and shall be interpreted under the laws of the State of New York, and any controversy arising under or in relation to this contract shall be settled by arbitration to be held in the City of New York, in accordance with the law of the State of New York and the rules then obtaining of the American Arbitration Association, Commercial Tribunal, or its successor, and the

parties consent to the jurisdiction of the Supreme Court of said State and further consent that any process or notice of motion or other application to the Court or a judge thereof or any other application or notice in said arbitration proceedings may be served outside the State of New York by registered mail or by personal service, provided a reasonable time for appearance is allowed and the judgment may be entered upon the award of the arbitrators in any court of competent jurisdiction."

The Superior Court denied the motion. Walborg appeals in petition for certiorari.

I

The first question which this situation of facts raises is to determine with precision the link between our local act on arbitration, 32 L.P.R.A. § 3201 *et seq.*, and the aforecited Act No. 75. As we said in *McGregor-Doniger* v. *Superior Court*, 98 P.R.R. 845, 850 (1970), "There is a vigorous policy favoring arbitration . . ." It was not always like that. For centuries there existed a decided judicial hostility to permit the development of the remedy of arbitration. Sturges and Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 Law & Contemporary Problems 580 (1952); H.R. No. 96, 68th Cong., 1st Sess. 1, 2 (1924).

[1] We reiterate that arbitration constitutes an extremely valuable means to settle controversies in a society. It deserves the most decided support and encouragement. It does not represent, however, a public policy of an absolute order, in view of which all other public policies must give in.

[2] Specific laws may embody values of such importance for a country that some or even all the controversies resulting from their impact must be declared not subject to arbitration, at least under specific clauses. Finally, the existence of a clause of arbitration does not exempt us from the old judicial duty of weighing the interests in controversy reflected by different legislations, nor from the obligation of preventing the deterioration of arbitration in a mechanism of evasion of vital legislative mandates.

It is thus acknowledged by the Supreme Court of the United States. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), cited with approval in *P.R. Housing Authority* v. *Superior Court; Zequeira, Int.*, 82 P.R.R. 333, 345 (1961), contract concerning purchase of securities with arbitration clause was involved. Section 14 of the Securities Act of 1933 prohibits any stipulation in such class of contracts binding the purchaser to waive the rights guaranteed to him by the law. The court refused to stay proceedings and to order arbitration under the federal law relative to the said matter. 43 Stat. 883; 9 U.S.C.A. § 3. The court considered that the right to select the judicial forum is part of the provisions that cannot be waived. It considered likewise that the great disadvantage in which the buyers customarily find themselves in these cases turn the arbitration clauses into evasive stratagems.

It has been determined also that the policy embodied in Title VII of the Civil Rights Act weighs more than the policy in favor of arbitration. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1973). For other instances in which arbitration has been judicially discarded, as required by higher values, see: *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *Aimcee Wholesale Corp.* v. *Tomar Products, Inc.*, 237 N.E. 2d 223 (N.Y. 1968); *cf. Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1973).

Act No. 75 of 1964 was approved for the express purpose of protecting the local dealers against undue practices on the part of the manufacturers. This problem is presently motive of intense concern in the United States. Brown, *Franchising: Fraud, Concealment and Full Disclosure*, 33 Ohio S.L.J. 517 (1972). The report of the Committee concerned, points out the reasons which moved the Puerto Rican lawmaker:

"The problem created in the system of distribution in Puerto Rico, has recently flared up by the unjust action of

manufacturing enterprises, domestic and foreign that, without just cause, terminate the relationship with their dealers and agents in Puerto Rico, as soon as the latter have created a favorable market for their products, frustrating the legitimate expectations and interests of those who have complied with their responsibilities so efficiently.

". . . . . .

"The traditional provisions which regulate contracts between private individuals have shown that they are not effective to protect the legitimate rights of the dealer or agent, for which reason it is necessary to legislate to regulate this relationship and warrant that the manufacturers act in good faith, equitatively, in no arbitrary manner, and preserve to the dealer or agent the rights and justified expectations inherent in the relationship. Besides, this would consequently give stability to the distribution relationship."

In the Statement of Motives of Act No. 75 it was stated:

"The Commonwealth of Puerto Rico cannot remain indifferent before the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaires, or agents, or without fully eliminating them, such enterprises gradually reduce and impair the extent of their previously established relationships; as soon as said dealers, concessionaires, or agents have created a favorable market and without taking into account their legitimate interests.

"The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest, and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, insofar as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices."

There is no doubt of the high priority given by the Legislature to the values represented by this Act. Note that in its art. 4 it is stated that the rights guaranteed by this act are of a public order and, as in *Wilko*, they cannot be waived. Act No. 75 unquestionably represents a strong public policy directed to level the contractual conditions between two groups financially unequal in their strength. Far from mitigating its effect on any occasion, the Legislature of Puerto Rico has reinforced it instead by providing that "in the adjudgment of the claims that may arise hereunder, *the courts of justice* shall recognize the right in favor of whom may effectively, have at his charge the distribution activities, notwithstanding the corporate or contractual structures or mechanisms that the principal or grantor may have created or imposed to conceal the real nature of the relationship established." (Italics ours.) Act No. 105 of June 23, 1966, art. 2. See: *Warner Lambert* v. *Tribunal Superior*, 101 D.P.R. 378 (1973).

[3, 4] In the light of these facts, we deem that to the arbitration clause agreed upon in this case cannot be granted more strength than to the policy represented by Act No. 75. The rights which Act No. 75 confer to dealers, besides, cannot be waived by express statement of the Legislature. That means, such as it was stated in *Wilko*, that the right that a dealer necessarily has to select the judicial forum for the hearing of his claims, cannot be waived for the due functioning of the protective scheme of the act. The clause under consideration also represents with crystal clearness a mechanism to evade the application of Act No. 75 to the contract herein involved. *Wilko* v. *Swan*, 346 U.S. 427, 435 (1953). Act No. 75 itself lastly orders, as we have seen, that the *courts of justice* recognize and protect the rights which it confers. Therefore, under the local law it is not proper to stay the judicial proceedings in this case.

II

[5] We should examine, in the second place, the effect of the federal arbitration act on this litigation 61 Stat. 669, 9

U.S.C.A. § 1 *et seq*. This act applies only to transactions in the interstate commerce. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). Such is the case at bar.

[6] In *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (1st Cir. 1968), *Sumaza* v. *Cooperative Association*, 297 F. Supp. 345 (P.R.R. 1969) and in other cases it has been held that under the federal law it is proper to stay proceedings grounded on Act No. 75 and that involve interstate commerce until arbitration is had, when it has been thus agreed upon by the parties. Does this mean that the federal arbitration act compels the state courts to decide likewise?

The question has not received until now a definite answer on the part of the Supreme Court of the United States. In *Prima Paint* v. *Flood & Corklin*, 388 U.S. 395 (1966) (Fortas), the court set forth that the federal arbitration act governs the conduct of the federal courts, but it carefully abstained from pronouncing itself as to its effect on other courts, matter which was not under its consideration. See: Bernstein, *Private Dispute Settlement* 671-672, Macmillan Co., 1968. Other courts have expressed themselves on the matter, but there exists diversity of opinion. In *Pullman Incorporated* v. *Phoenix Steel Corporation*, 304 A.2d 334 (Del. 1973), for example, it was held that the state courts are not bound to apply the federal act. In *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), and *Pinkis* v. *Network Cinema Corp.*, 512 P.2d 751 (Wash. 1973), the opposite was held.

For several reasons we favor the doctrine of *Pullman*. The language itself of the federal act supports the point of view that its provisions set rules of action only for federal courts. Section 3 operates only "If any suit or proceeding be brought in any of the courts *of the United States*." (Italics ours.) Note also the comparable restrictions which are inserted in secs. 4 and 7. Bernstein, *op. cit.*, 672.

The scheme represented by the federal arbitration act does not obey, in our opinion, to considerations of such ranking as would require uniformity of treatment by other political units

or that require that the values which such legislation embodies prevail over local values of high priority under any conceivable circumstance. The great merit of the North American federalism resides in the ample field which it reserves to local initiative, restricting the requirement of uniformity for questions really essential for the survivorship and enrichment of the unit of its political components. We do not understand that the commercial arbitration in any of its manifestations, requires a uniform approach. This is not the case, for example, of the application by the state courts of arbitration clauses under sec. 301 of the Labor Management Relations Act. *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962); *Steelworkers* v. *Warrior Gulf Co.*, 363 U.S. 574 (1959). Powerful considerations support uniformity in labor arbitrations, specially grounded on its condition of effective substitute for industrial warfare. See the distinction that to that effect is established in *Steelworkers, supra*, 578, between labor and commercial arbitration. We do not find reasons comparably persuasive to reach the same result in the situation at bar.

In the light of the conclusions which we have reached in this second part, it is not necessary, of course, to examine the impact on this case of the special relations between Puerto Rico and the United States.

III

[7] The problem of the effect of the agreement of the parties on the applicable law, assuming for the sake of arguments its separation from the problem raised by the arbitration clause, remains to be decided. The clauses in which the law is selected are usually considered valid when the jurisdiction selected has substantial connection with the contract. Leflar, *American Conflicts Law*, secs. 145-148, 1968 rev. ed.; Griswold Cheatham, Reese & Rosenberg, *Conflict of Laws* 543 *et seq.*, 5th ed. 1964. Said clauses are ineffective, nevertheless, when they collide against fundamental considerations of public policy of the forum. Goodrich, *Conflict of Laws* 202, 4th ed. (Scoles),

1964; 1 *Restatement of the Laws*, Second, *Conflict of Laws*, sec. 187, 1971; Ehrenzweig, *A Treatise on the Conflict of Laws*, 1962, sec. 176, 468-469. *Maryland Casualty Co.* v. *San Juan Racing Association*, 83 P.R.R. 538, 546 (1961).

[8] There is no doubt, in the light of what has been stated in the first part of this opinion, that the clause involved herein, selecting the laws of New York, is contrary to the public policy clearly considered fundamental by the Legislature of Puerto Rico. Such public policy would be defeated if the law of New York, where no legislation comparable to Act No. 75 exists, is applied to this case.

[9] The agreement of the parties regarding the law governing the transaction being invalid it is proper, therefore, to apply the law of the jurisdiction with the dominant contacts in the transaction. *Maryland Casualty, supra;* Leflar, *op. cit.*, 364-367; Goodrich, *op. cit.*, 204. In the present situation of facts such jurisdiction is Puerto Rico. The execution and performance of the contract would be effected here. Besides, the contract was performed by mail in which case the doctrine establishes that the place of contracting is the place — Puerto Rico again in this instance — where the letter of acceptance was mailed. Goodrich, *supra*, 204.

IV

[10] For the grounds stated, the order of the Superior Court denying the motion for dismissal filed by petitioner, will be affirmed. Therefore, the pronouncements to the contrary made in *McGregor-Doniger* v. *Superior Court*, 98 P.R.R. 845 (1970) are reversed.

Even though after *Warner Lambert Co.* v. *Tribunal Superior*, 101 D.P.R. 378 (1973), *McGregor-Doniger* was decided in a different manner, because a contract previous to the effective date of Act No. 75 was involved therein, we consider, nevertheless, that, because contracts based on the doctrine of *McGregor-Doniger* may have been executed, reasons of equity advise us to state that the rules established in the case at bar will only have a prospective effect. *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Johnson and Cassidy* v. *New Jersey*, 384 U.S. 719 (1966); Mishkin, *The Supreme Court: 1964 Term - Foreword, The High Court, The Great Writ and Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *People* v. *Cruz Jiménez*, 99 P.R.R. 548 (1971).

Mr. Justice Martín concurs in the result without an opinion.

AMICUS CURIAE

BRIEF

(7) (6)

Nos. 83-1569 and 83-1733

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In the Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION, PETITIONER

v.

SOLER CHRYSLER-PLYMOUTH, INC.

SOLER CHRYSLER-PLYMOUTH, INC., CROSS-PETITIONER

v.

MITSUBISHI MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT IN NO. 83-1569

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QUESTION PRESENTED

Whether the district court erred in referring the federal antitrust counterclaim in this case to foreign arbitration pursuant to the terms of the parties' contract.*

* The United States will not address the questions raised by the cross-petition, No. 83-1733, involving the arbitrability of claims under the federal Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*, the Puerto Rico Dealers Act, and the Puerto Rican antitrust laws.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1569

MITSUBISHI MOTORS CORPORATION, PETITIONER

v.

SOLER CHRYSLER-PLYMOUTH, INC.

No. 83-1733

SOLER CHRYSLER-PLYMOUTH, INC., CROSS-PETITIONER

v.

MITSUBISHI MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT IN NO. 83-1569

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the federal antitrust laws. However, private treble damages suits constitute a significant supplement to the government's antitrust enforcement efforts. The United States therefore has an interest in assuring that parties to a private contract do not employ general arbitration clauses in a manner that would improperly interfere with the role Congress has assigned to private actions in the antitrust enforcement scheme. The United States also is concerned with matters that affect our na-

tion's foreign relations and, specifically, with proper interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (entered into force for the United States December 29, 1970).

STATEMENT

1. Soler Chrysler-Plymouth, Inc. (Soler) is a Puerto Rican corporation with its principal place of business in Puerto Rico. Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation that was formed in 1970 as part of a joint venture between Chrysler International, S.A. (CISA) and Mitsubishi Heavy Industries, Inc. (Pet. App. A5-A6).[1]

In 1979 Soler and CISA entered into a Distributor Agreement, which gave Soler the right to sell vehicles manufactured for CISA by Mitsubishi (Pet. App. B1-B2). At the same time, Soler, CISA and Mitsubishi executed a Sales Procedure Agreement, with regard to Soler's ordering of the Mitsubishi-manufactured vehicles (*id.* at B2). That agreement provided that it "is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein" (J.A. 56). It also provided for arbitration in Japan of contract disputes arising under specified portions of the agreement (*id.* at 52-53).[2]

Some two years later, during a slump in the new car market, Soler was unable to meet its minimum sales commitments in its assigned territory. Soler therefore at-

[1] CISA, a Swiss corporation, is a wholly-owned subsidiary of Chrysler Corporation (Pet. App. A6). "Pet. App." refers to the appendix to the petition in No. 83-1569.

[2] Paragraph VI of the Sales Procedure Agreement provided (J.A. 52-53):

> All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.

tempted to transship vehicles to other areas, including Central and South America and the continental United States. Mitsubishi and CISA refused to permit transshipment, and Mitsubishi eventually withheld shipment of close to 1,000 vehicles ordered by Soler. In February 1982, Soler disclaimed responsibility for the vehicles stored in Japan. Pet. App. A6.

2. In March 1982, Mitsubishi brought suit against Soler in the United States District Court for the District of Puerto Rico, seeking an order compelling arbitration in Japan of alleged breaches of the Sales Procedure Agreement.[3] Mitsubishi also filed a request for arbitration with the Japan Commercial Arbitration Association. Pet. App. A6-A7.

Soler denied the allegations of the complaint and counterclaimed against Mitsubishi and CISA, alleging violations of, inter alia, the Sherman Act, 15 U.S.C. 1 *et seq.*;[4] the federal Automobile Dealers' Day in Court Act, 15 U.S.C. 1221 *et seq.*; the Puerto Rico Dealers Act; and the Puerto Rican antitrust statute. J.A. 76-103. Mitsubishi then asked the district court to compel arbitration of Soler's counterclaims and to stay pending arbitration proceedings on any counterclaim the court determined to be nonarbitrable (*id.* at 113-114).

The district court ordered Mitsubishi and Soler to arbitrate Soler's federal antitrust counterclaim, as well as several other claims raised by the parties. Pet. App.

[3] The alleged breaches of contract included nonpayment for stored vehicles, nonpayment of contractual storage penalties, damage to Mitsubishi's warranties and goodwill, and failure to obtain financing as required by the Sales Procedure Agreement. Pet. App. A6, B2.

[4] Soler contended that Mitsubishi and CISA had unlawfully attempted to replace Soler with a Mitsubishi subsidiary and had allocated territories in a manner that unreasonably restricted the areas in which Soler could sell vehicles. Soler requested $10 million in damages in connection with its federal antitrust counterclaim. J.A. 91-96.

B1-B13.[6] The district court recognized that antitrust claims are not arbitrable in a domestic context (*id.* at B9-B10). It concluded, however, that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its implementing legislation, 9 U.S.C. 201 *et seq.*, required an order compelling arbitration of Soler's federal antitrust counterclaim (Pet. App. B5-B9).

3. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A29). It held, inter alia, that Soler's federal antitrust counterclaim was not arbitrable.[6] The court agreed with all other federal courts of appeals that had considered the issue that the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, does not mandate arbitration of antitrust claims arising in domestic disputes because arbitration could pose unacceptable dangers to private enforcement of the antitrust laws (Pet. App. A15-A16). The court believed that foreign countries would be unlikely to regard United States insistence on judicial determination of antitrust disputes as parochial, in view of the known importance of United States antitrust laws and the existence of similar statutes or policies in several European nations (*id.* at A16-A18). On the other hand, if courts could be ousted of jurisdiction over antitrust disputes simply because a foreign entity was included as a party to an arbitration agreement, antitrust enforcement would be seriously hampered (*id.* at A18). The court concluded that the doctrine precluding arbitration

[6] The district court also ordered arbitration of Mitsubishi's contract claims and Soler's Dealers' Day In Court and Puerto Rican law counterclaims against Mitsubishi.

CISA did not request arbitration of the counterclaims Soler filed against it. Thus, those counterclaims (including the federal antitrust counterclaim against CISA) were to follow their normal course in the district court. Pet. App. B11-B12.

[6] Following oral argument, the court of appeals invited the United States to submit a brief amicus curiae addressing the arbitrability of Soler's antitrust counterclaim under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The brief filed by the United States in response to that request took the position that the antitrust counterclaim was not arbitrable.

of antitrust claims would apply at least to an agreement governing the sale and distribution of products in the United States (*ibid.*).

The court of appeals concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not foreclose such a holding because an agreement to arbitrate antitrust issues would not concern a "subject matter capable of settlement by arbitration," as required by Article II(1) of the Convention. Pet. App. A18-A23.[7] The court of appeals also held that this Court's decision in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), did not require referral of Soler's antitrust counterclaim to arbitration. Pet. App. A23-A28. The court of appeals left to the district court the decision "whether both arbitrable and nonarbitrable matters should proceed on their own course or whether one set of problems should await resolution of the other" (*id.* at A28-A29).[8]

INTRODUCTION AND SUMMARY OF ARGUMENT

United States law generally requires federal courts to be hospitable to arbitration, which has proved to be an effective mechanism for resolution of many types of disputes. Where international agreements are involved, the interests of international commerce may require enforcement of an agreement to arbitrate even when a matter would be nonarbitrable in a domestic context; moreover, the Convention on the Recognition and Enforcement of

[7] The text of the Convention is reprinted at Pet. App. F1-F7. It appears also in the note following 9 U.S.C.A. 201.

[8] The court of appeals affirmed the district court's judgment as to all other issues raised by the appeal. See Pet. App. A29. Thus, Soler's counterclaims based on the federal Dealers' Day in Court Act and the Puerto Rican Dealers Act and antitrust statute were to be referred to arbitration.

While the petition and cross-petition were pending, the district court on remand determined that Soler's federal antitrust counterclaim did not "permeate" the litigation. It therefore stayed litigation of that counterclaim and ordered that the arbitration proceed. See J.A. 6.

Foreign Arbitral Awards, to which the United States has acceded, contemplates that courts will enforce agreements to arbitrate in most cases. On the other hand, the United States antitrust laws embody a policy of preserving competition that is of great significance to our national interests. In establishing the antitrust enforcement scheme, Congress has assigned a crucial role to private plaintiffs, who are entitled to recover treble damages in federal court. While we recognize that exceptions to arbitrability are quite limited, particularly with respect to an agreement to arbitrate in connection with an international commercial transaction, we believe that the special public enforcement role Congress has assigned to private antitrust claims requires that such claims be regarded as nonarbitrable in both the domestic and international contexts.

A. 1. Every court of appeals that has considered the question has held that federal antitrust claims are not arbitrable. There is strong support for that uniform view of congressional intent. The antitrust laws embody a highly significant national policy. Congress has assigned private suits a key role in the public enforcement scheme by providing that a private plaintiff may recover treble damages in federal court. In view of that special role, it is most unlikely that Congress would have intended that parties to a contract could avoid judicial resolution by diverting private antitrust claims to arbitration.

The role that private antitrust actions play in vindicating important public interests in the preservation of competition renders them inappropriate for determination by arbitration. Such claims often involve firms that possess substantial market power, and the agreement to arbitrate itself may reflect an exercise of that market power by the stronger party. Arbitrators normally are drawn from the business community the antitrust laws are intended to regulate; in addition, they are likely to be less qualified than Article III judges to deal with the complex issues that arise in antitrust cases and more inclined to substitute general notions of fairness between the parties for careful economic analysis and interpretation of statutory policy. Finally, although they may be useful in the resolution of many types of commercial disputes, arbitral procedures—including limitations on discovery, the absence of a written opinion in some cases, and the limited scope of judicial review—are not adequate to effectuate antitrust enforcement policies. Of course, even though an antitrust claim is nonarbitrable, a court may order arbitration of contract claims to proceed, thereby serving both the policy of antitrust enforcement and the policy in favor of arbitration.

2. The Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, does not render antitrust claims arbitrable. Although that Act was intended generally to authorize judicial enforcement of agreements to arbitrate and to make federal courts more hospitable to arbitration, nothing in its text or legislative history is sufficient to overcome the strong indications that Congress did not intend private antitrust claims to be arbitrable.

B. The fact that Soler's federal antitrust counterclaim arose in connection with an international commercial transaction does not render it subject to arbitration.

1. In some cases the fact that a dispute arises in the context of an international commercial transaction may make it more appropriate to enforce an agreement to arbitrate than if the dispute had arisen in a domestic context. That is not the case with federal antitrust claims. So long as there is a sufficient effect on United States commerce to bring a dispute within the coverage of the antitrust laws, private suits serve the same functions as in a domestic context, by supplementing governmental enforcement resources, punishing violators, deterring future violations, and publicizing anticompetitive conduct. Foreign arbitrators are even less likely than domestic arbitrators to be familiar with United States antitrust laws, and arbitral procedures, and limitations on judicial review interfere with antitrust enforcement interests at least as much in foreign arbitration as in domestic arbitration. To the extent parties may contract out of antitrust liability altogether by means of an agreement to arbitrate combined with a choice of law clause,

arbitration clearly undermines antitrust enforcement interests, particularly in a case like this one, in which a substantial effect on United States commerce is alleged.

Arbitration of antitrust claims is not required by this Court's decision in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), which involved an alleged securities law violation and an international agreement to resolve disputes through foreign arbitration. In this case, unlike in *Scherk*, there was no uncertainty concerning the applicable law; it should have been clear to the parties that the Sherman Act would apply to alleged anticompetitive restraints on the sale of vehicles shipped into Puerto Rico. Moreover, the concern of the United States with affording a federal judicial forum for private treble damages actions under the antitrust laws is not the sort of parochialism the Court disapproved in *Scherk*.

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not require arbitration of federal antitrust claims. Although the Convention contemplates that Contracting States will enforce agreements to arbitrate in most cases, it expressly permits them to make limited exceptions for cases in which arbitration would frustrate particularly important national policies. In view of the special importance Congress has assigned to private suits in the antitrust enforcement scheme, such suits come within the limited class of matters that are properly regarded as nonarbitrable under the Convention.

ARGUMENT

THE FEDERAL ANTITRUST CLAIM IN THIS CASE SHOULD NOT HAVE BEEN REFERRED TO FOREIGN ARBITRATION

A. Congress Intended That Federal Antitrust Claims Would Not Be Subject To Arbitration

1. The rule that federal antitrust claims are not arbitrable is well established, at least in the domestic context.[9] Every court of appeals that has considered the

[9] Soler suggests in its cross-petition in No. 83-1733 that its agreement to arbitrate did not extend to antitrust claims. We assume

question has held that such claims are nonarbitrable.[10] Indeed, in the court of appeals Mitsubishi did not even contest the proposition that federal antitrust claims are not subject to arbitration in a domestic context.[11]

There is strong support for this uniform holding of the courts of appeals. At the time it enacted the Sherman Act in 1890, Congress could not have intended that private treble damages actions would be subject to arbitration. At that time both federal and state courts were

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for purposes of this brief that the courts below were correct in concluding (see Pet. App. A11-A13, B7) that Soler's federal antitrust counterclaim fell within the scope of its agreement to arbitrate disputes arising out of the Sales Procedure Agreement.

[10] *Lake Communications, Inc.* v. *ICC Corp.*, 738 F.2d 1473, 1477-1480 (9th Cir. 1984); *University Life Insurance Co.* v. *Unimarc Ltd.*, 699 F.2d 846, 850-851 (7th Cir. 1983) (Posner, J.); *Applied Digital Technology, Inc.* v. *Continental Casualty Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *N.V. Mattschappij Voor Industriele Waarden* v. *A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976); *Varo* v. *Comprehensive Designers, Inc.*, 504 F.2d 1103, 1104 (9th Cir. 1974); *Cobb* v. *Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *Helfenbein* v. *International Industries, Inc.*, 438 F.2d 1068, 1070 (8th Cir.), cert. denied, 404 U.S. 872 (1971); *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F.2d 980, 983-984 (9th Cir. 1970); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d 710, 715-716 (9th Cir. 1968); *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, 825-828 (2d Cir. 1968). See also *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 107 F. Supp. 532, 548 (S.D.N.Y. 1952), rev'd on other grounds, 202 F.2d 731 (2d Cir. 1953). Cf. *Silvercup Bakers, Inc.* v. *Fink Baking Corp.*, 273 F. Supp. 159, 162-163 (S.D.N.Y. 1967).

This Court recognized essentially the same principle in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 176 (1948). The Court held that the district court had the power to establish an arbitration system for consenting movie distributors and exhibitors to settle certain licensing disputes, but it emphasized that such a system "would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations * * * of the Sherman Act" (*ibid.*). Cf. *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930).

[11] Mitsubishi contended only that the uniform rule stated by the courts of appeals should not be applied to international business transactions. See Mitsubishi C.A. Br. at 29-30.

unsympathetic to enforcement of arbitration agreements. See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 & n.4 (1974); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-123 (1924). Congress undoubtedly understood that, at least in the absence of express statutory authorization, arbitration agreements involving the right to sue under the antitrust laws would be unenforceable.

More fundamentally, the longstanding and exceptional importance that Congress has attributed to suits by private parties in the antitrust enforcement scheme makes it most unlikely that it would have intended such claims to be arbitrable. The Sherman Act is "a comprehensive charter of economic liberty" that is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958). The Sherman Act makes the Attorney General primarily responsible for enforcement (15 U.S.C. 4). However, Congress knew that the federal government would have only limited resources with which to pursue antitrust violations. In order to encourage vigorous enforcement, Congress expressly authorized private parties injured by antitrust violations to sue in federal courts, without regard to the amount in controversy; and it permitted private plaintiffs to recover treble damages and costs, including attorneys fees. 15 U.S.C. 15; Sherman Act § 7, 26 Stat. 210 (1890).

This treble damages provision does more than simply compensate injured parties. Treble damages constitute a special incentive to the enlistment of private parties—who are in the best position to be aware of violations—as "private attorneys general." See, *e.g.*, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. Rev. 1072, 1073-1074 (1969). Treble damages also serve as a particularly effective

means of punishing those who have violated the antitrust laws and thus of deterring potential violators. See 21 Cong. Rec. 3146-3147, 3150, 4091 (1890); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 138-139 (1968); *Lawlor* v. *National Screen Service*, 349 U.S. 322, 329 (1955); *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), cert. denied, 350 U.S. 825 (1955) (L. Hand, J.). Indeed, in the case of corporations, which cannot be imprisoned, treble damages are a far more effective deterrent to criminal activity than are fines.

In enacting the treble damages provision, Congress could hardly have intended that private parties would have the option of relinquishing the right to bring such public judicial actions in favor of private arbitration.[12] At the time the Sherman Act was passed, the treble damages provision was an extraordinary and unprecedented measure. It remains remarkable today. While Congress has granted private rights to sue for damages under many statutes, very few authorize the award of treble damages.[13]

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[12] Indeed, Congress was so concerned with keeping treble damages suits in the federal courts that it rejected an effort to amend the proposed legislation to authorize similar suits in state courts. Senator Hoar, the floor manager of the bill, successfully argued that Congress should not (and indeed could not) allow state courts to hear private treble damages actions because such actions had "penal" and "punitive" characteristics and thus were proper for resolution only by federal judges. 21 Cong. Rec. 3146-3147, 3150 (1890). See also *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U.S. 436, 440 (1920); *Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d at 189.

[13] Our research reveals only three other statutes that authorize private treble damages actions: 15 U.S.C. 72 (antidumping); Section 901(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 1964; and 46 U.S.C. 1227 (discriminatory agreements among common carriers by water).

The treble damages provisions of the antitrust laws are distinguishable from statutes under which triers of fact in their discretion may award punitive damages. See, *e.g.*, 18 U.S.C. 2520; 15 U.S.C. 298(c). Under the antitrust laws, once a plaintiff has proved

In sum, Congress intended private actions under the antitrust laws to serve to vindicate important public interests in the preservation of competition, rather than merely to resolve disputes between the parties to the lawsuit. Cf. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). It is for this reason that they constitute a special class of claims not subject to arbitration. See *American Safety Equipment Corp.*, 391 F.2d at 826.

It is this important public interest ingredient of antitrust claims that renders them inappropriate for determination by arbitration.[14] While arbitration can be an effective and efficient way of resolving a wide variety of claims, it presents numerous difficulties in the area of antitrust.

Antitrust claims often involve firms that singly or by agreement possess monopoly power; indeed, the core purpose of the antitrust laws is to prevent the anticompetitive use of such power. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58-62 (1911). It would be detrimental to the public interest to permit contracts imposed through the exercise of such economic power to determine the forum for settlement of antitrust disputes. See *American Safety Equipment Corp.*, 391 F.2d at 827. A monopolist or cartel member could use its market power to obtain from a customer an open-ended surrender of its rights to seek redress in court. Even when arbitration clauses are not technically contracts of adhesion, there is likely to be a significant disparity in economic power between the parties, which makes it more likely that the weaker parties will relinquish their rights.

liability and actual damages, there is an automatic trebling of those damages.

[14] The public interest nature of an antitrust claim is not lessened by the fact that it involves a vertical rather than horizontal restraint (see Mitsubishi Br. 22 n.11). In either class of claims, the antitrust laws protect competition, not particular individuals. Anticompetitive vertical arrangements are illegal precisely because of their broader effect on the economy. See, *e.g.*, *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 7 (legality of vertical conduct to be judged primarily by "market impact").

In addition, arbitrators frequently are chosen from the business community that is regulated by the antitrust laws. See *American Safety Equipment Corp.*, 391 F.2d at 827. While such arbitrators may in fact be entirely fair, the public perception of such arrangements tends to undermine confidence in the even-handed administration of the antitrust laws. And, as Judge Posner has noted, many arbitrators are not even lawyers. *University Life Insurance Co.* v. *Unimarc Ltd.*, 699 F.2d at 851. Such arbitrators may be unable to handle the complex legal issues often involved in antitrust claims. See Pitofsky, *supra*, 44 N.Y.U. L. Rev. at 1078. Arbitrators may be inclined to substitute general notions of fairness between the parties for careful economic and legal analysis. See Loevinger, *Antitrust Issues As Subjects of Arbitration*, 44 N.Y.U. L. Rev. 1085, 1090-1091 (1969).

Furthermore, in some cases, limitations on fact gathering may prevent plaintiffs from pursuing antitrust claims effectively in an arbitral proceeding. See Loevinger, *supra*, 44 N.Y.U. L. Rev. at 1090-1091; Pitofsky, 44 N.Y.U. L. Rev. *supra*, at 1080. Preparation of a written opinion is generally optional; indeed, arbitrators may be encouraged to avoid written opinions. See, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); *Wilko* v. *Swan*, 346 U.S. 427, 436 (1953); *Domke on Commercial Arbitration* § 29:06 (G. Wilner rev. ed. 1984); Pitofsky, *supra*, 44 N.Y.U. L. Rev. at 1076-1077. Even the results of an arbitration may be kept confidential, so that neither the federal government nor other injured parties will be alerted to the existence of possible violations. An arbitral award generally may not be set aside, even for errors of law, unless it is clearly arbitrary. See 9 U.S.C. 10, 207; *Wilko* v. *Swan*, 346 U.S. at 436-437; *Domke on Commercial Arbitration*, *supra*, at ch. 34. While the absence of arbitral opinions and the substantial inability of courts to review arbitral decisions may be entirely acceptable in the resolution of other types of commercial disputes, they create an unac-

ceptable risk of incorrect and irremediable decisions on competition issues that Congress has designated as unusually important to the public interest in competitive functioning of the economy.[15] Finally, there is a substantial question whether arbitrators may award punitive damages (see *id.* § 33.03), which may make arbitration particularly attractive to potential antitrust defendants. If an arbitrator may award only actual damages for an antitrust violation, arbitration will eliminate a significant deterrent to anticompetitive behavior.[16]

This is not to suggest that insubstantial antitrust counterclaims should be allowed to delay arbitration of clearly arbitrable contract claims. To the contrary, a district court has ample discretion to order that arbitration of contract claims proceed prior to, or in tandem with, litigation of the antitrust claims.[17] The decision whether to allow arbitration to proceed normally will be based at least in part on the likelihood of success on the merits of the antitrust claims.[18] In the present case, for

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[15] See Pitofsky, *supra*, 44 N.Y.U. L. Rev. at 1077 (noting significant decisions of this Court in private antitrust suits that could have been diverted into arbitration); Loevinger, *supra*, 44 N.Y.U. L. Rev. at 1091-1093 (discussing antitrust decisions of this Court that probably would have been decided differently by arbitrators).

[16] Mitsubishi notes (Br. 25) that an agreement to arbitrate a pre-existing antitrust dispute is not regarded as contrary to the public interest. See *Cobb* v. *Lewis*, 488 F.2d at 47-48; *Coenen* v. *R.W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.), cert. denied, 406 U.S. 949 (1972). The rationale for allowing arbitration in such circumstances is that the parties to an antitrust dispute are always free to settle, and arbitration is an acceptable form of settlement agreement. *Ibid.* This case, in contrast, involves a sweeping, pre-dispute arbitration agreement, entered into before the alleged anticompetitive activities had taken place, and before the parties had any opportunity to evaluate the strength of their legal positions.

[17] See, *e.g.*, Pet. App. A28-A29; *Sam Reisfeld & Son Import Co.* v. *S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976); *A. & E. Plastik Pak Co.* v. *Monsanto Co.*, 396 F.2d at 716.

[18] See Pet. App. A28-A29; *University Life Insurance Co.* v. *Unimare Ltd.*, 699 F.2d at 851-853; *Applied Digital Technology, Inc.*

example, the district court on remand sent most of the claims to arbitration prior to hearing the antitrust claims, apparently based on a determination that the latter were of doubtful merit. See Mitsubishi Br. 11. In our view, this approach, involving a "quick look" at the validity of antitrust claims, is entirely appropriate. To the extent arbitration of nonantitrust claims is permitted to proceed, both the policy in favor of arbitration and the policy in favor of antitrust enforcement are served.

2. The considerations we have described, indicating that Congress viewed arbitration of antitrust claims as inconsistent with the public interest in effective enforcement of the antitrust laws, similarly lead to the conclusion that Congress did not intend to make antitrust claims arbitrable in 1925 when it passed the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* Although that Act broadly provides that arbitration agreements in a "contract evidencing a transaction involving commerce" are enforceable in the federal courts (9 U.S.C. 2), nothing in its text or legislative history shows that Congress meant for private antitrust claims to be arbitrable.[19]

The Federal Arbitration Act is a general statute that was designed to give federal courts the power and duty to enforce a wide range of arbitration agreements and to make the courts more hospitable to the process of arbitration. S. Rep. 536, 68th Cong., 1st Sess. 2-3 (1924); H.R. Rep. 96, 68th Cong., 1st Sess. 1 (1924); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 510-511. As this Court

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v. *Continental Casualty Co.*, 576 F.2d at 118; *N.V. Maatschappij Voor Industriele Waarden* v. *A.O. Smith Corp.*, 532 F.2d at 876; *Coenen* v. *R.W. Pressprich & Co.*, 453 F.2d at 1215-1216.

[19] Any suggestion that the only exceptions to the coverage of the Federal Arbitration Act are those expressly mentioned in the text of the Act or in other statutes is foreclosed by *Wilko* v. *Swan*, *supra*, in which this Court held that the federal arbitration statute must yield to the provisions for district court enforcement in the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, despite the fact that the latter statute does not expressly mention either arbitration or the arbitration statute.

has noted, the Arbitration Act reflects "a national policy favoring arbitration." *Southland Corp.* v. *Keating*, No. 82-500 (Jan. 23, 1984), slip op. 7.[20] But there is no indication that in passing the Act Congress intended to render every conceivable type of commercial claim arbitrable, regardless of any competing policies under other federal statutes.

As we have explained, private antitrust actions differ from most other types of commercial claims, because of the role such actions play in a public enforcement scheme. While arbitration of most types of commercial claims would not interfere significantly with any public interest, subjecting federal antitrust claims to arbitration would undermine seriously Congress's purposes to effectuate the strong public interest in competition. In these circumstances, we believe that if Congress had wished to alter the prevailing rule,[21] it would have provided expressly for that result. Compare, *e.g.*, 35 U.S.C. 294 (authorizing agreements to arbitrate disputes concerning patent validity or infringement). Nothing in the language of the Federal Arbitration Act or in the brief and generally worded legislative history of that Act makes such an express change.[22]

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[20] Mitsubishi quotes at some length from this Court's opinion in *Southland Corp.* v. *Keating*. However, that case does not concern the arbitrability of federal antitrust claims; rather, it holds that the Federal Arbitration Act preempts contrary state law. The Court expressly distinguished the latter question from the question whether Congress itself intended an exception to the federal arbitration statute. See slip op. 13 n.11.

[21] We have not found any case prior to 1925 that addresses the arbitrability of private antitrust claims; however, we also have not discovered any case in which such a claim was arbitrated in the period between 1890 and 1925—presumably because there was a clear understanding during that period that Congress had not permitted such arbitration.

[22] Indeed, Section 2 of the Arbitration Act provides that an agreement to arbitrate shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. In 1925, as now, a bargain contrary to public policy would be invalid and therefore revocable. See *Pope Mfg. Co.* v. *Gormully*, 144 U.S. 224, 234-237 (1892); 6A A. Corbin, *Corbin on Contracts* § 1375 (1962); 2 Restatement of the Law of Contracts §§ 512, 598 (1932). At the time, it was settled that some matters were not arbitrable for public policy reasons. For example, a complaining party's participation in a criminal action clearly was not subject to arbitration. See, *e.g.*, *Wise* v. *Johnson*, 14 Ala. App. 396, 69 So. 986 (1915); *Partridge* v. *Hood*, 120 Mass. 403, 405 (1876); *Mevay* v. *Edmiston*, 1 Rawle 457 (Pa. 1829). In view of the punitive and deterrent functions of private antitrust actions (see pages 10-11, *supra*) and the criminal nature of Sherman Act violations, a private antitrust plaintiff is not unlike a complainant in a criminal case.

B. The Fact That Soler's Federal Antitrust Counterclaim Arose In Connection With An International Commercial Transaction Does Not Render It Subject To Arbitration

1. Arbitration Of A Federal Antitrust Claim That Arises In Connection With An International Commercial Transaction Is No More Appropriate Than Arbitration Of A Domestic Claim

a. In some cases the fact that a dispute arises in the context of an international commercial transaction may make it more appropriate to enforce an agreement to arbitrate that dispute. For example, in *Scherk* v. *Alberto-Culver Co.*, *supra*, in which a United States company had initiated a securities law action against a German individual, this Court concluded that it was appropriate to compel arbitration pursuant to the terms of an international contractual agreement, despite its prior holding in *Wilko* v. *Swan*, *supra*, that securities claims were not arbitrable in the context of a domestic dispute. In the case of a federal antitrust claim, however, the presence of an international commercial transaction does not make arbitration more appropriate than in the domestic context. The concern that arbitration would undermine the special role of the private treble damages remedy Congress provided as part of the antitrust enforcement scheme applies with at least equal force in the context of international disputes.

In drafting the private treble damages provision, Congress drew no distinction between domestic antitrust claims and those that would arise in connection with international transactions. See 15 U.S.C. 15. If an international transaction that involves an unreasonable restraint of trade has sufficient effect on United States commerce to come within the prohibition of the federal antitrust laws,[23] private antitrust suits attacking that restraint will serve the same public interest functions as a similar suit in a domestic context—*i.e.*, they will supplement governmental enforcement resources, punish violators, deter future violations, and bring to light anticompetitive conduct that otherwise might remain undiscovered.

The fact that a dispute arises in an international context does not make it more or less likely to involve parties with unequal bargaining power. The problems for antitrust enforcement created by arbitral procedures are at least as significant in cases of international arbitration as in domestic arbitration. For example, the Japanese arbitrators who would decide the claims in this case lack the power of compulsory process (see J.A. 218-219); thus, they may never obtain access to crucial witnesses or documents. Compare 9 U.S.C. 7 (district court may compel attendance of witnesses before arbitrators). Nor do Japanese arbitrators have the power to take testimony under oath (J.A. 219). Japanese arbitral proceedings are closed to the public (*id.* at 220); and the arbitrators are not required to provide reasons for their award if the parties so agree (*id.* at 221). Thus, a United States court may have no basis on which to review the adequacy of the arbitrators' assessment of the facts or their ap-

[23] Transactions that arise in an international setting may nevertheless be subject to the United States antitrust laws. The nationality of the parties is one of several factors that federal courts may weigh in deciding whether to assert subject matter jurisdiction over such claims, but it is not in itself a dispositive criterion. See *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir. 1976).

plication of the law.[24] While such procedures may be well suited to determination of many types of commercial claims, they are clearly inconsistent with the public interest in effective private enforcement of the antitrust laws.

Moreover, foreign arbitrators are even less likely than domestic arbitrators to be familiar with the United States antitrust laws, including judicial interpretations of those laws (see page 13, *supra*). Although arbitrators involved in major international arbitrations may be distinguished jurists (see ICC Am. Br. 15-17), it is nonetheless quite unlikely that most foreign arbitrators—particularly those chosen to deal with ordinary commercial contract disputes—will be as familiar with United States antitrust laws as an Article III judge.[25] While many of these arbitrators will be quite capable in many respects, they may come from countries that have no antitrust laws at all, or that have antitrust laws that are markedly different from United States laws. In

[24] Amicus ICC suggests (Br. 27) that the competitive concerns of the United States can be addressed adequately when a party seeks enforcement of an arbitral award. But unless the arbitral proceedings have resulted in a complete record and statement of the reasons for the award, a federal court would be required to engage in de novo consideration of the antitrust claim. That may or may not be possible, depending on how broad an interpretation is placed on the "public policy" exception contained in Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See page 26, *infra*. Moreover, rather than having two forums decide the antitrust issue on two separate records, it would be far more efficient for a court to refer the non-antitrust issues to arbitration, where possible, and to retain jurisdiction of the antitrust claim. In cases in which the antitrust issue is asserted as a counterclaim, it may even be unnecessary to consider the antitrust issue once the initial dispute is settled. Cf. pages 14-15, *supra*.

[25] Mitsubishi (Br. 25) and amicus ICC (Br. 17) suggest that foreign arbitrators are more qualified to decide antitrust disputes than American juries. However, unlike foreign arbitrators, American juries receive detailed legal instructions from a court familiar with United States antitrust law.

many cases, foreign law is more hospitable to conduct that our law condemns, and in some instances it may be hostile to conduct our law permits. See 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 4.02 (1981).

It is even possible that an arbitrator acting pursuant to an arbitration clause in an international agreement would not apply United States antitrust law at all because of the parties' choice of forum or choice of substantive law under the agreement. Indeed, amicus ICC acknowledges this possibility (Br. 24-25).[26] In such a case, the parties would have succeeded in contracting out of liability under the United States antitrust laws, a result that clearly would not be permitted in a domestic context. See, generally, *Thomas* v. *Matthiessen*, 232 U.S. 221, 234 (1914); 15 S. Williston, *A Treatise on the Law of Contracts* § 1750A (3d ed. 1972).[27]

Such a result would be particularly troubling in a case like this one, in which the transactions at issue directly affect United States commerce. Here one of the contracting parties (Soler) is a United States company; the articles that were the subject of the contract were sold and delivered in the United States; and the alleged anticompetitive effects occurred in the United States.[28] Thus, although this dispute arose in the context of an international commercial transaction, the United States' interest in effective enforcement of the antitrust laws is very strong.[29]

[26] The contract in this case states that Swiss law will govern the agreement, as if the contract was entirely performed in Switzerland (J.A. 56). In an informal discussion with an official of the Swiss Embassy before we filed our amicus submission with the court of appeals, we were advised that, in that official's view, a Swiss court would be unlikely to apply United States antitrust laws to an agreement "entirely performed" in Switzerland. There is obviously no basis for assurances that a Japanese arbitrator would conclude otherwise.

[27] It is not clear that such a contract would be permissible if the foreign forum were a court, rather than an arbitral tribunal. This Court has stated that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). See also *id.* at 17.

We think the conclusion is inescapable that compelling arbitration of Soler's federal antitrust counterclaim by Japanese arbitrators, who may choose not to apply United States antitrust laws, would be inconsistent with Congress's intent regarding the role private actions were to play in the antitrust enforcement scheme.

b. Nor does this Court's decision in *Scherk* v. *Alberto-Culver Co.*, *supra*, support arbitration in this case. In *Scherk*, the Court considered a clause requiring foreign arbitration[30] contained in a contract between a United States company and a German citizen for the sale of several European businesses and trademarks. The lower courts had refused to stay the United States company's action for damages for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), based on that Act's prohibition on agreements to waive compliance with any of its provisions, 15 U.S.C. 78cc(a). Although this Court had held in *Wilko* v. *Swan*, *supra*, that claims under the Securities Act of 1933 are nonarbitrable in a domestic context, it declined to apply the *Wilko* rule to the "truly international agreement" before it in *Scherk* (417 U.S. at 515). The Court noted first that, unlike in *Wilko*, where there was no doubt that United States law applied to the dispute, in *Scherk* it was unclear what substantive law would apply in the absence

[28] For purposes of the Sherman Act, Puerto Rico is treated as a state of the United States, not a territory. See *Cordova & Simonpietri Insurance Agency Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36, 38-44 (1st Cir. 1981).

[29] Obviously it remains for Soler to prove its allegations. We take no position on the merits of the federal antitrust counterclaim.

[30] The arbitration clause in *Scherk* provided that arbitration would take place in France, but that the substantive law of Illinois would apply. 417 U.S. at 508.

of the arbitration provision. The Court viewed the choice-of-law and choice-of-forum provisions of the agreement to arbitrate as "an almost indispensable precondition to * * * the orderliness and predictability essential to any international business transaction." 417 U.S. at 516. Second, the Court believed that a "parochial" refusal by courts of one country to enforce an international arbitration agreement would "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-517. Finally, any advantage in choice of courts and venue the securities laws might give a plaintiff in a domestic dispute could well be "chimerical" in the context of an international contract, since a foreign party might obtain a foreign court order nullifying the advantage. *Id.* at 517-518.

The concerns that underlay the Court's decision in *Scherk* lack force in the context of this case.[31] Since the agreement between Soler and Mitsubishi dealt with the sale of vehicles shipped into Puerto Rico, it should have been clear that the Sherman Act would apply to alleged anticompetitive restraints in connection with the agreement.[32] See Pet. App. A25. Moreover, the concern of the

[31] The third concern mentioned by the Court in *Scherk*, involving the significance for arbitrability of a choice of courts and venue under the securities laws, is not relevant in the case of the antitrust laws.

[32] See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) (Congress intended the antitrust laws to extend to the utmost extent of its power to regulate interstate and foreign commerce). The potential application of the Sherman Act became even clearer once Soler alleged that Mitsubishi and CISA had allocated markets and prohibited Soler from selling automobiles to dealers in the continental United States. See, *e.g.*, *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d at 608-615; Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401 *et seq.*, 96 Stat. 1246-1247.

In contrast to the agreement involved here, the contract in *Scherk* had only a minimal relationship to the United States. See 417 U.S. at 515 ("the subject matter of the contract concerned the sale of business enterprises * * * primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets").

United States with ensuring that private antitrust claims are heard in federal courts is not the sort of parochialism the Court disapproved in *Scherk*. As we next explain, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards recognizes that certain subjects may be considered so essential to national interests that Contracting States will insist that they be nonarbitrable, even in an international context; and we show that, in view of the special role Congress has assigned to private actions in the antitrust enforcement scheme,[33] such actions are properly regarded as falling within that limited exception to arbitrability under the Convention. In these circumstances, *Scherk* should not be read to require foreign arbitration of federal antitrust claims.[34]

2. *While The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards Generally Mandates Enforcement Of International Agreements To Arbitrate, It Does Not Require United States Courts To Compel Arbitration Of Federal Antitrust Claims*

In 1958, a conference sponsored by the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention provides that the Contracting States shall recognize and

[33] Although the securities laws that were at issue in *Scherk* are of substantial importance, the court of appeals correctly noted (Pet. App. A26) that they differ from the antitrust laws in significant respects. The securities laws were enacted in large part to protect individual investors (see *United States* v. *Naftalin*, 441 U.S. 768, 774-777 (1979); *Wilko* v. *Swan*, 346 U.S. at 431), while the antitrust laws exist to protect competition itself. Moreover, Congress has provided that private antitrust plaintiffs may recover treble damages, but has provided only for recovery of actual damages by securities plaintiffs. Thus, in the antitrust enforcement scheme private suits play a central role in vindicating the public interest. See *Lake Communications, Inc.* v. *ICC Corp.*, 738 F.2d at 1478 n.3.

[34] Although the Court in *Scherk* referred to the Convention as providing general confirmation for its holding there, it did not specifically consider the scope of exceptions to arbitrability established by the Convention. See 417 U.S. at 520-521 n.15.

enforce agreements to arbitrate certain international disputes and the awards that result from such arbitration.[35] While the Convention contemplates that Contracting States generally will be hospitable to international arbitration agreements, by its own terms it does not require enforcement of arbitration for all claims. The Convention expressly anticipates that a Contracting State may determine a subject to be nonarbitrable in certain limited circumstances. In our view, federal antitrust claims fall within that narrow class of nonarbitrable matters.

a. We stress at the outset our belief that under the Convention Contracting States must, with limited exceptions, enforce agreements to arbitrate international disputes. As this Court has noted, the purposes of the Convention were to encourage the recognition and enforcement of arbitration agreements in international contracts and to establish uniform standards in connection therewith. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 517 n.10. We fully support these purposes, which are of considerable importance to United States businesses engaged in international commerce. The assumption underlying the

[35] The United States did not sign the Convention at the time it was adopted by the United Nations conference. However, support for the Convention grew in the United States, and in 1968 the President transmitted the Convention to the Senate for its advice and consent. In 1970, the Senate consented to United States accession to the Convention. Pursuant to Article I(3) of the Convention, Congress specified that only arbitration agreements and awards arising out of commercial legal relationships would fall under the Convention. 9 U.S.C. 202.

The primary reasons the United States did not originally sign the Convention were a perceived "conflict with * * * domestic laws," traditional common law hostility to arbitration and lack of support in the business community. S. Exec. Rep. 10, 90th Cong., 2d Sess. 1, 4 (1968). In his 1968 letter of transmittal to the Senate, the President stated that experience under the Convention had established that it contributed in many ways to the promotion of international trade and investment. The President also reported substantial support for United States accession among members of the business community concerned with international trade and in the legal community. S. Exec. Doc. E, 90th Cong., 2d Sess. 1 (1968).

Convention is that most claims arising out of international agreements will be amenable to arbitration and that the agreement of the parties to arbitrate such claims should be honored by the Contracting States.[36] United States courts should avoid restrictive interpretations that would undermine the generally proarbitration purposes of the Convention and the United States' accession to it.[37]

However, as the court of appeals recognized (Pet. App. A18-A23), the Convention by its own terms does not require arbitration of every claim that might fall within the scope of an international arbitration agreement. Three provisions of the Convention—Articles II, III, and V—express the general objective of encouraging arbitration, but permit certain limited exceptions, including an exception for nonarbitrable subject matter.

Article II of the Convention concerns recognition of agreements to arbitrate and judicial referral of parties to arbitration. Article II(1) requires Contracting States to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship * * *." However, this obligation is not unconditional; Article II(1) defines the agreements that must be recognized as those "concerning a subject matter capable of settlement by arbitration."

Article II(3) requires a court to refer a controversy to arbitration, at the request of one of the parties, if the parties have agreed to arbitrate. But the agreement the court is to enforce must be one "within the meaning of

[36] Mitsubishi and its amici correctly point out that, at least in recent years, arbitration of a wide variety of complex international disputes has become a familiar practice that increasingly has gained general acceptance in the international community.

[37] See *Rhone Mediterranee Compagnia* v. *Lauro*, 712 F.2d 50, 53-54 (3d Cir. 1983); *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *I.T.A.D. Associates, Inc.* v. *Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981); *Parsons & Whittemore Overseas Co.* v. *Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973-974 (2d Cir. 1974).

this article." Such agreements are those that, in accordance with Article II(1), concern "a subject matter capable of settlement by arbitration." [38]

Other provisions of the Convention govern recognition and enforcement of foreign arbitral awards. Article III states the general principle that foreign arbitral awards will be recognized and enforced by all Contracting States. However, Article V lists several grounds on which a court may decline to enforce an award. In particular, Article V(2)(a) allows a court to refuse enforcement of an award if it finds that the "subject matter of the difference is not capable of settlement by arbitration" under the law of the country where enforcement is sought; and under Article V(2)(b) a court may refuse enforcement if the "recognition or enforcement of the award would be contrary to the public policy" of the country where enforcement is sought.[39]

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[38] Even when a dispute concerns arbitrable subject matter, Article II(3) allows a court to refuse to refer parties to arbitration if it "finds that the said agreement is null and void, inoperative or incapable of being performed." The court of appeals noted (Pet. App. A19-A20 & n.9) that these latter restrictions on referral appear to look not to the subject matter of the arbitration, but to the fundamentals of procedural fairness and feasibility. Accord, *Rhone Mediterranee Compagnia* v. *Lauro*, 712 F.2d at 53-54; *Ledee* v. *Ceramiche Ragno*, 684 F.2d at 187; *I.T.A.D. Associates, Inc.* v. *Podar Bros.*, 636 F.2d at 77. But see G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 27-28 (1958) (*Haight*) ("incapable of being performed" may be meant to include subject matter arbitrability).

[39] These limitations on enforcement of arbitral awards strongly suggest that Article II is properly read similarly to limit the requirement of referral to arbitration in the first place. The terms of Articles II and V are not identical, and there is no express linkage between the two, perhaps because initial drafts of the Convention dealt only with recognition of arbitral awards, while the provisions on recognition of arbitration agreements were added at a later stage. Some delegates expressed concern that lack of a specific provision in Article II relating the arbitration agreement to an arbitral award capable of enforcement might lead to disputes concerning nonarbitrable subject matter. See *Haight* 27-28. This perceived deficiency was never corrected. Haight suggests, however, that the courts may, *e.g.*, link Articles II(3) and V(2)(b) by "find[ing] an agreement incapable of performance if it offends the law or the public policy of the forum." *Haight* 28.

Some delegates argued that it was unnecessary to include both subparagraphs 2(a) and (b) of Article V, since nonarbitrability (Article V(2)(a)) was encompassed within the public policy exception of Article V(2)(b). See *Haight* 66-71. In the end, the delegates retained both grounds. The negotiating history reflects very little discussion about the sorts of subjects that might be considered nonarbitrable or awards that might be contrary to the public policy of a given country. See *ibid.* Cf., *e.g.*, *Waterside Ocean Navigation Co.* v. *International Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984) (public policy defense of Article V limited to violations of "most basic notions of morality and justice").

[40] There is no basis for Mitsubishi's suggestion (Br. 41) that the reference in the State Department memorandum to "laws in force" should be read to include only the text of statutes and not the judicial interpretation of those texts.

b. The legislative history of the United States' accession to the Convention confirms that the Convention permits courts to decline to enforce an agreement to arbitrate if arbitration of the subject matter would frustrate particularly important national policies. When the President presented the Convention to the Senate, it was accompanied by a memorandum from the Department of State analyzing the articles of the Convention. The memorandum assured the Senate that accession would not preclude United States courts from declining to refer to arbitration certain matters the United States viewed as nonarbitrable:

> The requirement [of Article II(1)] that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration.

S. Exec. Doc. E, 90th Cong., 2d Sess. 19 (1968).[40] As an example, the memorandum noted that "[i]n some States of the United States * * * disputes affecting the title to real property are not arbitrable" (*ibid.*). In discussing Article V(2), the memorandum noted that both the nonarbitrability provision and the public policy exception

"would give the courts to which application is made considerable latitude in refusing enforcement." S. Exec. Doc. E, *supra*, at 21. The memorandum further expressed the view that the exceptions to enforcement of awards provided in Article V(2) also would apply to the Article II(3) provision for enforcement of agreements to arbitrate. S. Exec. Doc. E, *supra*, at 19.

The Senate's consent to accession should be viewed in light of the State Department interpretation that was before it at the time.[41] As this Court has noted, such interpretations are entitled to great weight in interpreting a treaty. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194-195 (1961). It is therefore appropriate to conclude that the Senate, in consenting to accession, understood that the Convention would not require United States courts to enforce arbitration agreements in a limited class of matters as to which arbitration would interfere with fundamental policies of the United States.

c. Although the Convention clearly contemplates the existence of certain subject matters as to which courts may decline to require arbitration, it does not specify what matters are within that category. In light of the general purpose of the Convention to encourage the recognition and enforcement of foreign arbitral awards, we believe the category of subject matter determined to be nonarbitrable should be quite limited.[42] In our view, Contracting States should identify "certain *categories* of claims [as] non-arbitrable" only when there is a "special national interest vested in their [judicial] resolution" (*Parsons & Whittemore Overseas Co.* v. *Societe Generale de l'Industrie du Papier* (*RAKTA*), 508 F.2d 969, 975

[41] The Senate report and the floor debate on the Convention are very abbreviated and shed no light on the issue now before the Court. See S. Exec. Rep. 10, *supra*; 114 Cong. Rec. 10487-10488, 29350-29353, 29605 (1968).

[42] Claims that are nonarbitrable in a domestic context would not automatically be nonarbitrable under the Convention. This Court's decision in *Scherk* makes that clear, even apart from the requirements of the Convention.

(2d Cir. 1974) (emphasis in original)) such that enforcement of agreements to arbitrate such claims would necessarily frustrate a national policy of fundamental importance.[43]

We believe that federal antitrust claims fall within this narrow exception to arbitrability under the Convention.[44] We base our conclusion on the significant public interest role that private antitrust suits play in the enforcement scheme of a statute that is central to our nation's economic policy and the importance of having such claims adjudicated in federal court. See pages 9-14, *supra*. Requiring referral of federal antitrust claims to arbitration, conducted by foreign arbitrators pursuant to privately selected law, would frustrate a national policy of fundamental importance.

This Court in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. at 516-517, expressed concern that refusal by United States courts to enforce an international arbitration

[43] For examples of matters that courts of other nations have held nonarbitrable, and therefore outside the scope of the Convention, see *Audi-NSU Auto Union A.G.* v. *S.A. Adelin Petit & Cie* (Cour de Cassation, Belgium, 1979), in 5 Y.B. Commercial Arbitration 257 (1980) (Belgian law precludes arbitration of disputes arising under a Belgian statute concerning unilateral termination of exclusive distributorships); *Compagnia Generale Construzioni* v. *Piersanti* (Corte di Cassazione, Italy, 1979), in 6 Y.B. Commercial Arbitration 229 (1981) (Italian law precludes arbitration of labor disputes).

[44] See *Lake Communications, Inc.* v. *ICC Corp.*, 738 F.2d at 1479 n.5 (Convention does not require referral of antitrust claims to arbitration); *Parsons & Whittemore Overseas Co.* v. *Societe Generale*, 508 F.2d at 974, 975 (suggesting that under Article V(2)(a) of the Convention, a court sitting in the United States might be expected to decline to enforce an award involving arbitration of an antitrust claim); *Societe Nationale pour la Recherche* v. *General Tire & Rubber Co.*, 430 F. Supp. 1332, 1334 (S.D.N.Y. 1977). See also A. van den Berg, *The New York Arbitration Convention of 1958*, at 369 (1981) (noting that classic examples of nonarbitrable subject matters include antitrust). *Cf. La Societe Nationale pour la Recherche* v. *Shaheen Natural Resources Co.*, 585 F. Supp. 57, 63 (S.D.N.Y. 1983), aff'd, 733 F.2d 260 (2d Cir. 1984) (rejecting public policy defense based on antitrust considerations on the facts before the court).

agreement might lead to retaliatory steps by other countries. However, the 68 nations that have adopted the Convention have done so in the knowledge that there are certain matters that other Contracting States may determine to be nonarbitrable on the ground that arbitration of those matters would frustrate fundamental national policies. Indeed, several Contracting States already have identified particular matters that they decline to refer to arbitration. See note 43, *supra*. The Contracting States know that the Convention will not work effectively unless all signatories show mutual respect for other nations' infrequent, but important, judgments concerning nonarbitrability. As the court of appeals noted (Pet. App. A17), the world community is well aware of the importance the United States attaches to its antitrust laws.[45] The United States' determination that federal antitrust claims are nonarbitrable under the Convention therefore is not likely to result in either surprise or recrimination on the part of other signatories to the Convention.

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[45] Similarly, the Federal Republic of Germany, which is also a signatory to the Convention, considers its antitrust rule to be part of the *ordre public* and explicitly prohibits a predispute agreement to arbitrate certain classes of antitrust claims that precludes alternative recourse to the courts. See Section 91(1) of the Act Against Restraints of Competition, *reprinted in* 1 Organisation for Economic Co-operation and Development, *Guide to Legislation on Restrictive Business Practices* (1980).

CONCLUSION

Insofar as it holds that Soler's federal antitrust counterclaim should not be referred to arbitration, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

Nos. 83-1569 and 83-1733

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF CROSS-RESPONDENT AND REPLY BRIEF OF PETITIONER

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IN THE

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OCTOBER TERM, 1984

Nos. 83-1569 and 83-1733

MITSUBISHI MOTORS CORPORATION,

Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,

Respondent and Cross-Petitioner.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF CROSS-RESPONDENT AND REPLY BRIEF OF PETITIONER

Petitioner and Cross-Respondent Mitsubishi Motors Corporation ("MMC") submits this brief (a) in response to the Brief of Respondent and Cross-Petitioner ("Respondent's Brief") and the *amicus curiae* briefs submitted by the Commonwealth of Puerto Rico ("Puerto Rico") and the National Automobile Dealers Association ("NADA") in support of the cross-petition (No. 83-1733) and (b) in reply to the Respondent's Brief and the *amicus curiae* brief submitted by the United States in opposition to MMC's petition (No. 83-1569).

Introduction

Chapter One of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (the "Act"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *implemented by* Chapter Two of the Act, 9 U.S.C. §§ 201-208 ("Convention"), are a comprehensive scheme enacted by Congress for the express purpose of ensuring the efficacy of arbitration as an alternative to judicial resolution of private commercial disputes. By requiring that all forms of parochialism and hostility to arbitration be set aside, this Court has repeatedly upheld the integrity of that statutory scheme and has, accordingly, mandated that arbitration agreements be enforced. *See, e.g., Southland Corp.* v. *Keating*, — U.S. —, 104 S. Ct. 852 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

Respondent's Brief, read in conjunction with the briefs of the three *amici curiae* submitted in support of respondent's position, represent nothing less than a frontal assault on the Act and the decisions of this Court which enforce its terms. They would have this Court declare that commercial arbitration agreements, freely entered into, are not enforceable whenever a federal judge determines that (i) a federal statute presents "important" public policy issues, (ii) a state statute presents "important" state policy issues or (iii) a particular class of plaintiffs has been specifically protected by statute.

The adoption of the position advocated by Soler Chrysler-Plymouth, Inc. ("SCP"), would vitiate the certainty of enforcement vital to the Act and the Convention, and would relegate the arbitrability of all but the most conventional

contract disputes to *ad hoc* judicial policy determinations. It was just such a restrictive view, hostile to arbitration, which the Act and the Convention were enacted to avoid.

Summary of Argument

Respondent's Brief and the briefs of the *amici curiae* ignore the unequivocal mandate of the Act, which requires the federal courts to enforce agreements to arbitrate. The doctrine created by *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), represents a usurpation by the lower courts of Congress's power to make laws. Respondent and its supporters fail to address the actual language of the Act and the Convention, and the clear congressional goal of promoting arbitration as an alternative to litigation; instead, they speculate that Congress might not have intended to include claims under the federal antitrust statutes within the purview of the Act. Indeed, lacking any evidence for that position, the United States falls back on the assertion that, because Congress did not, by express reference, include Clayton Act claims within the Act, the Court must find that Congress intended to exclude them. (Brief of United States at 16).

The Court should not countenance such an attempt to permit the judiciary to override the policy determinations already made by Congress. Rather, the Court should reaffirm the settled rule that where, as here, Congress has performed its designated function by weighing competing policy concerns and enacting legislation, the federal courts should honor those choices and enforce that legislation as written. The free-ranging commission which respondent and its supporters would grant to the federal courts is not only unsound, but would violate the separation of powers which is fundamental to our federal system of government.

Even if the Court were to conclude that federal courts might permissibly balance state and federal statutory policies against the Act in particular circumstances, the resolution which is proposed by respondent in this case is entirely without merit.

The argument that the *American Safety* doctrine should be approved is premised upon fundamental misconceptions about the arbitral process. Both respondent and the United States assume that an arbitral tribunal either (i) would not entertain a private claim brought under the antitrust laws and that enforcement of those laws would thereby be weakened or (ii) would be incapable of rendering a competent, fair decision with respect to such a claim.

The first assumption is simply unfounded, both on this record and as a matter of law. In this case, the Japan Commercial Arbitration Association ("JCAA") accepted SCP's antitrust counterclaims and was prepared to adjudicate them, without objection by MMC, until SCP unilaterally withdrew them from arbitral determination. (*See* Respondent's Brief at 12-13). Nor is this case unique in that regard; when a party goes to court and obtains an order compelling arbitration of its opponent's claims, then that claim most certainly will be adjudicated by the arbitrators.

The second assumption as to the inadequacy of arbitration is refuted by the increasing sophistication of arbitral tribunals and the complexity of matters routinely adjudicated by them, a trend acknowledged by the United States. (Brief of United States at 25 n.36). The suggestion that an arbitral tribunal cannot adequately decide an antitrust claim is simply an invitation to the Court to revert to the hostility toward arbitration which the Act and the Convention were enacted to end.

The argument advanced by Puerto Rico, that even though arbitration of SCP's claim under Puerto Rico's Act 75 is appropriate, the parties' agreements with respect to forum and choice of law are unenforceable as against the public policy of Puerto Rico, represents an attempt to have this Court return to the parochialism which was specifically rejected in *Scherk* and *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Its adoption would have a devastating impact on the certainty which businesses seek when they include arbitration provisions and choice of law and forum clauses in their commercial agreements. Moreover, Puerto Rico's argument is conclusively rebutted both by the Court's decision last term in *Southland* and by the Treaty of Friendship, Commerce and Navigation Between the United States and Japan, 4 U.S.T. 2063 (1953).

Finally, the suggestion made by respondent and NADA, that the passage of a federal statute designed to protect a specific class of dealers from arbitrary termination by their manufacturers represented a congressional preclusion of arbitration of those rights, is not supported by either the language or legislative history of the Dealers' Day In Court Act. That statute did nothing more than ensure that an automobile dealer's franchise could only be terminated in good faith. Nothing in the statute suggests that it bars a dealer from agreeing that such a determination may be made by neutral arbitrators rather than a federal court. There is not any suggestion by respondent or NADA that the Dealers' Day In Court Act represents a national policy which outweighs the strong national interest in enforcing arbitration agreements.

In the event the Court should conclude that one or more of the policy arguments advanced by respondent might, as a matter of domestic law, constitute grounds for avoiding

arbitration, the international character of the dispute between MMC and SCP nonetheless renders arbitration mandatory under *Scherk* and the Convention. Nothing in Respondent's Brief or the *amici* briefs provides any basis for a contrary conclusion.

ARGUMENT

I.

Judicial Exemptions to the Federal Arbitration Act for Particular Statutory Claims Constitute an Impermissible Usurpation of Congress's Legislative Authority

As set forth in Petitioner's initial brief ("Petitioner's Brief") at 13-15, Section 2 of the Act is mandatory by its terms. It requires the federal courts to enforce any agreement to arbitrate disputes arising in relation to transactions involving commerce "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court held in *Southland:*

> "We discern only two limitations on the enforcement of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' "

— U.S. at —, 104 S. Ct. at 858 (footnote omitted).

There is no basis in the record to suggest that either of the two limitations articulated in *Southland* is present in this case, nor is any such limitation suggested by respondent or by the United States.[1]

Absent a basis for exemption which is rooted in the statute itself, the United States baldly states that the issue is whether anything in the "text or legislative history [of the Act] shows that Congress meant for private antitrust claims to be arbitrable." (Brief of United States at 15; footnote omitted). It supports this characterization of the issue by asserting that "[a]ny suggestion that the only exceptions to the coverage of the Federal Arbitration Act are those expressly mentioned in the text of the Act or in other statutes is foreclosed by *Wilko* v. *Swan*". (*Id.* at 15 n.19).

Only last term, however, this Court observed that:

> "The question in *Wilko* was . . . whether Congress, in subsequently enacting the Securities Act, had in fact created . . . an exception [to § 2 of the Federal Arbitration Act]."

Southland, — U.S. at — n.11, 104 S. Ct. at 861 n.11.

Thus, the United States predicates its entire argument on an erroneous interpretation of *Wilko*. The issue is not whether the text or legislative history of the Act reveals an intent specifically to include antitrust claims within its coverage; rather, because the Act is, by its terms, all-inclusive, the proper inquiry is whether Congress created such an exception to the statute's broad mandate.[2]

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[1] In its brief, the United States obliquely refers to the revocability limitation when it suggests that "a bargain contrary to public policy would be invalid and therefore revocable." (Brief of United States at 16 n. 22). That reference is, of course, entirely inapposite, since the antitrust violation alleged by SCP is entirely unrelated to the arbitration agreement itself. *Cf. Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

[2] As noted in MMC's initial brief (Petitioner's Brief at 16), the Act specifically excludes from its coverage certain statutory claims,

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Because there is no congressional expression of intent to exclude antitrust claims from arbitration, the United States proffers a tortured reading of history from which it concludes that Congress "understood" that it was not requiring arbitration of antitrust claims. Thus, it notes that in 1890 "both federal and state courts were unsympathetic to enforcement of arbitration agreements," (Brief of United States at 9-10), and that "Congress undoubtedly understood that, at least in the absence of express statutory authorization, arbitration agreements involving the right to sue under the antitrust laws would be unenforceable." (*Id.* at 10). That proposition proves far too much, because there was not then any mechanism for enforcing any arbitration agreement, precisely the problem to which the Act was addressed. When Congress overcame the existing hostility to arbitration in 1925 by passing the Act, and at the same time specifically exempted certain types of claims from the Act, *see* 9 U.S.C. § 1, it necessarily "understood," if anything, that absent such exemption, antitrust claims would, like all others, be subject to the terms of the Act.

Apparently recognizing the impact of the failure of Congress to include antitrust claims within the specific exemptions of the Act, the United States attempts to explain the omission by noting the apparent absence of cases prior to 1925 involving arbitration of an antitrust claim, "presumably because there was a clear understanding during

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thereby implying that no other exclusions were intended. Moreover, in *Southland* this Court held that the limitation of the Act to contracts "involving commerce" indicated the broad scope of coverage intended by Congress. — U.S. at —, 104 S. Ct. at 860. The antitrust laws are, of course, a prime example of Congress's exercise of its power over commerce. *See McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980). Accordingly, the matters included and excluded by the language of the Act clearly indicate that antitrust claims are within its coverage.

that period that Congress had not permitted such arbitration." [3] (Brief of United States at 16 n.21). Purportedly, the absence of any pre-1925 cases establishes what the United States characterizes as the "prevailing rule" of non-arbitrability of this "special class" of cases. Thus, it concludes that "we believe that if Congress had wished to alter the prevailing rule, it would have provided expressly for that result." (Brief of United States at 16; footnote omitted). Of course, the same could be said of any class of statutory or common law claims prior to 1925. The absence of any reported case of arbitration of an antitrust case before that date is undoubtedly the result of there having been no effective judicial mechanism for enforcement of arbitration agreements.

There is, therefore, no explicit or implicit evidence that Congress intended to exclude antitrust claims from the broad mandatory scope of the Act. Shorn of rhetoric, the United States' argument is succinctly summarized:

> "More fundamentally, the longstanding and exceptional importance that Congress has attributed to suits by private parties in the antitrust enforcement scheme *makes it most unlikely that it would have intended such claims to be arbitrable.*"

(Brief of the United States at 10; emphasis added).

Thus, the United States is asking this Court to speculate as to what Congress "would have intended," rather than to make the determination, as in *Wilko*, as to what Congress in fact did. The creation of a sweeping exception to the Act for all antitrust claims, based upon such speculation, would constitute a usurpation of congressional authority.

[3] A private right of action for antitrust plaintiffs was not created until passage of the Clayton Act in 1914.

II.

Considerations of Public Policy Do Not Justify Exemption of Antitrust Claims From Arbitration

As set forth in Point I, it is the legislative function to balance the policy considerations underlying the Act against those presented by the antitrust statutes. Accordingly, this Court need not decide whether it is appropriate to create an exemption, on public policy grounds, to the enforceability of agreements to arbitrate antitrust claims. Even if such a review of those policy concerns were appropriate, however, the exemption from arbitration sought by respondent would still be unwarranted.

Respondent and the United States both rely upon the rationale of *American Safety* in arguing for exemption from the Act for antitrust claims. That decision rests upon two fundamental misconceptions about the arbitral process.[4]

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[4] The briefs of respondent and its supporting *amici* are replete with references to contracts of adhesion and disparity of bargaining power. Despite those rhetorical allusions, no real issue is presented as to whether the Sales Procedure Agreement between MMC and SCP is a contract of adhesion. First, while respondent has referred to contracts of adhesion and to a "contract drafted by MMC," it has not presented any evidence which would lend any support to that contention. Indeed, the record strongly supports a contrary inference. The Distributor Agreement between Chrysler International, S.A. ("CISA") and SCP (JA 18-41) does not have an arbitration clause and, although CISA is a party to the Sales Procedure Agreement, it is not a party to that contract's arbitration provision.

SCP also argues at length that the arbitration agreement is "limited" and not "broad." While the District Court and the Court of Appeals properly rejected SCP's contention that the clause does not encompass the statutory claims at issue here, that argument conclusively refutes any inference that this contract is one of adhesion. In any event, SCP never claimed in the courts below, and has thereby waived any claim, that the arbitration agreement itself was unenforceable on this ground. Moreover, under the rule of *Prima Paint*, a claim that the contract as a whole is voidable as a contract of adhesion is for the arbitrators, and not for the court. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 637 F.2d 391, 398 (5th Cir. 1981).

First, the United States asserts that arbitrators might refuse to adjudicate private treble damage claims. Second, it contends that arbitral tribunals and procedures are not adequate to ensure protection of the public interest represented by the antitrust laws. Both of those assumptions about the arbitral process are unfounded both in fact and in law.

A. Arbitrators Will Adjudicate Antitrust Claims

The United States properly emphasizes the importance of the private right of action established by the Clayton Act as a significant component of antitrust enforcement. It errs, however, in its assumption that the arbitral process will not vindicate such private rights.

Nothing in the record or in the experience of over a half century of commercial arbitration establishes that arbitrators will not take cognizance of private antitrust claims. In fact, in this case it was MMC which sought to compel arbitration of SCP's antitrust counterclaims. That motion was granted by the District Court, and SCP thereafter submitted its counterclaims to the JCAA for adjudication. MMC did not object to JCAA adjudication of those claims or any portion of them; to the contrary, MMC demanded such arbitration. Similarly, the JCAA accepted jurisdiction over SCP's antitrust counterclaims and established procedures to determine them. SCP's antitrust claims, including its treble damage claims, likely would already have been decided by the JCAA but for the decision of the Court of Appeals and SCP's subsequent withdrawal of its antitrust claims from the JCAA.[5]

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[5] The record in this case is not unique. For example, in *Scherk* there was no suggestion that the securities claims there at issue would not be determined upon referral to arbitration. Thus, neither

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Similarly, the briefs filed in this case are now replete with examples of distinguished arbitral tribunals undertaking determination of numerous disputes involving complex subject matter. (*See* Brief of International Chamber of Commerce at 15-21).

Indeed, the suggestion that arbitrators will limit their own subject matter jurisdiction based upon some set of guidelines extraneous to the will of the parties evidences a fundamental misapprehension of the nature of arbitration. Arbitration, even under the auspices of arbitration organizations such as the International Chamber of Commerce, the American Arbitration Association or the JCAA, is not based upon an independent jurisprudence. Arbitrators derive their power to decide disputes solely from the prior agreement of the parties. Reference to arbitration, therefore, neither increases, nor decreases, the parties' legal rights.

Viewed from this perspective, the United States' suggestion, that private antitrust enforcement will be undermined in arbitration proceedings, is clearly erroneous. The mechanism by which antitrust claims will reach an arbitral tribunal ensures that they will be adjudicated. Typically, it is a distributor, such as SCP, which presents an antitrust claim to the federal courts, and is confronted with a motion by the defendant to compel arbitration. By seeking to compel arbitration, the defendant has committed itself to arbitration of the claim.[6]

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the parties nor the Court evidenced any concern that private enforcement, which plays a critical role under the securities laws, would be vitiated by reference of those claims to arbitration.

[6] In the unlikely event that a defendant did subsequently successfully attempt to frustrate the private plaintiff's right to adjudication

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Thus, it is clear that the very nature of the arbitral process and the procedures established by the Act guarantee that private antitrust enforcement will continue unabated in arbitration proceedings. Both the private right to redress and the deterrence factor represented by such private enforcement will be fully vindicated by arbitral resolution.

The United States relies extensively upon the treble damage provisions of the Clayton Act as justification for the unique exemption it seeks for antitrust claims. It contends that the trebling provision evidences the unique importance which Congress attaches to antitrust claims; on the other hand, it expresses an anxiety that arbitrators will not award treble damages and thereby will undermine antitrust enforcement. (Brief of United States at 10-11, 14).

Treble damage provisions are undeniably an important part of the enforcement scheme established by the Clayton Act. They cannot, however, sustain the heavy burden the United States attempts to load on them. First, it is clear that private enforcement of statutory rights in areas critical to the national interest are not materially affected by the absence of treble damage provisions. For example, the securities laws, the commodities laws, the patent laws, the trademark laws and the copyright laws all rely extensively upon private enforcement. None of these fundamental federal statutes have conferred upon a private litigant the

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before the arbitral tribunal, that argument would undoubtedly estop it from objecting to the reinstatement of the antitrust claim in the federal court, not to mention the awkward position in which it would have placed itself with the district court which initially ordered arbitration. Similarly, in the event that an arbitral tribunal declined, *sua sponte*, to adjudicate an antitrust claim presented to it, a district court would, in all likelihood, permit the plaintiff to reinstate his claim and obtain a judicial resolution.

automatic right to treble damages granted by the Clayton Act, yet there has been no perceptible impact on private enforcement of those statutory rights.[7]

Furthermore, the suggestion that Congress's provision for treble damages establishes the unique importance of the antitrust laws is belied by other congressional enactments providing for automatic treble damages, but for which such exaggerated claims of overwhelming public importance cannot possibly be made. For example, in addition to those statutes to which the United States directed the Court's attention (Brief of United States at 11 n.13), Congress has provided treble damages for (i) those injured by the failure of the Union Pacific Railroad to operate as a continuous line, 45 U.S.C. § 83, (ii) willful refusal of a bank to recredit a customer's account following an erroneous electronic funds transfer, 15 U.S.C. § 1693f(e), and (iii) improper loans to officers of a correspondent bank, 12 U.S.C. § 1975.

These examples make it clear that Congress has provided for treble damages for reasons which may have nothing to

[7] The trademark laws provide a compelling illustration against using a treble damage remedy as the equivalent of a congressional determination to prohibit arbitration. In the Trademark Counterfeiting Act of 1984, Pub.L. No. 98-473, Ch. XV, 98 Stat. 1837, 2178 (1984), Congress mandated the award of treble damages in civil cases in which the defendant has been shown to have "intentionally" used a mark "knowing" it to be counterfeit. *Id.* § 1503 (2)(B) (to be codified at 15 U.S.C. § 1117(b)). Thus, MMC would be entitled to treble damages if SCP intentionally sold counterfeit automobile replacement parts bearing MMC's mark. Yet such an issue of trademark misuse is both clearly within the scope of the arbitration provision (*see* Sales Procedure Agreement, Article IV, JA 50-51) and a proper subject of arbitration, *see Saucy Susan Products, Inc.* v. *Allied Old English, Inc.*, 200 F. Supp. 724 (S.D.N.Y. 1961). The treble damage remedy itself is not an indication that Congress has decided that trademark claims under the Lanham Act are not arbitrable.

do with the impact of the statute on the national interest, just as it has exempted certain classes of statutory claims from arbitration, and has not excluded others, for reasons other than their respective significance. (*See* Petitioner's Brief at 19).

Finally, there is no support for the suggestion that arbitrators would not grant treble damages where called for by applicable law. As indicated above, a defendant's act of demanding referral of antitrust claims to the arbitral tribunal establishes the latter's jurisdiction to hear those claims, and there is no reason to believe that the arbitrators chosen by the parties will not apply the antitrust laws as written.[8]

B. Arbitral Tribunals Are Competent to Adjudicate Antitrust Claims

The second assumption upon which the United States bases its argument for an extraordinary exemption of antitrust claims from arbitration is that arbitral tribunals and processes are not equipped to provide full and fair adjudication of antitrust issues. (Brief of United States at 13). This contention of the United States is curious in light of its concession that "arbitration of a wide variety of complex international disputes has become a familiar practice that increasingly has gained general acceptance in the international community." (Brief of United States at 25 n.36). The simple fact is that, as demonstrated by the briefs of the International Chamber of Commerce and the American

[8] As was noted in Petitioner's Brief, the United States' concern for the limitation on antitrust enforcement is exaggerated in the context in which arbitration of antitrust cases typically arises. (Petitioner's Brief at 22 n.11). Moreover, it is doubtful whether overall antitrust enforcement is promoted by most such dealer suits. (*Id.* at 26-33).

Arbitration Association, arbitral procedures are perfectly capable of providing adjudication of even the most sophisticated and complex questions.

Moreover, given the extremely high quality of arbitrators and the high incidence of lawyers among them, the suggestion that arbitrators' comprehension of the subleties of United States antitrust doctrine will not be at least as great as that of American juries, however well instructed, is untenable.

Similarly, the professed concern that important antitrust issues will be entrusted exclusively to businessmen ignores the fact that, under virtually every arbitral scheme, selection of the arbitrators is within the control of the parties themselves. *See, e.g.*, JCAA Commercial Arbitration Rules (JA 211, 215-217). Thus, in this case all three arbitrators are eminent lawyers, professors and/or jurists.

More fundamentally, however, the position of the United States is that arbitration is a second class method of dispute resolution, appropriate only for more routine matters not invested with national significance.

> "It is this important public interest ingredient of antitrust claims that renders them inappropriate for determination by arbitration. While arbitration can be an effective and efficient way of resolving a wide variety of claims, it presents numerous difficulties in the area of antitrust."

(Brief of United States at 12; footnote omitted). Acceptance of the position of the United States would represent a reversion to the judicial hostility to arbitration which the Act was designed to eliminate and which this Court has consistently rejected.

III.

The Court of Appeals and the District Court Correctly Referred SCP's Dealer Protection Claims to Arbitration

SCP argues that it did not agree to submit certain of its claims to arbitration because the arbitration clause in issue is not a "broad arbitration clause[] in which parties agree to arbitrate 'any controversy or claim arising out of or relating to this contract, or for the breach thereof,'" but rather is more "narrow in scope." (Respondent's Brief at 16). That contention is without merit.

The arbitration clause in issue provides as follows:

> "All disputes, controversies or differences which may arise between MMC and [SCP] *out of or in relation to* Articles I-B through V of this Agreement *or for the breach thereof*, shall be finally settled by arbitration in Japan. . . ."

(JA 52-53; emphases added).

The arbitration clause, by providing for arbitration of any claim "which may arise . . . out of or in relation to" the enumerated provisions of the Sales Procedure Agreement or their breach,[9] was written using language which

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[9] Examination of the Sales Procedure Agreement reveals that the provisions defining the rights, duties and obligations between SCP and MMC are set out in detail in Articles I-B through V of the agreement. (JA 43-52). That is why the arbitration provision, found in Article VI, is defined by relation to Articles I-B through V. The excluded provisions primarily concern matters relating to the contractual relationship between CISA, which is not a party to the arbitration agreement, and SCP. Thus, Article VIII is an acknowledgment that the Sales Procedure Agreement does not relieve SCP of any money it may owe CISA; Article IX provides that SCP renounces any claim against CISA under the Distributor Agreement; Article XI

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this and other courts have long held to constitute an agreement to arbitrate both contractual and statutory claims. Indeed, an argument substantially identical to the one SCP now advances was rejected by this Court in *Southland*.

> "Appellees contend that the arbitration clause, which provides for the arbitration of 'any controversy or claim arising out of or relating to this Agreement or the breach hereof', does not cover their claims under the California Franchise Investment Law. We find the language quoted above broad enough to cover such claims."

— U.S. at — n.7, 104 S. Ct. at 860 n.7.[10] *See Prima Paint*, 388 U.S. at 398 (claim of fraud in inducement of contract arbitrable under clause providing for arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof . . ."); *Scherk*, 417 U.S. at 508 n.1; *Commerce Park at DFW Freeport* v. *Mardian Construction Co.*, 729 F.2d 334, 339 n.4 (5th Cir. 1984); *Griffin* v. *Semperit of America, Inc.*, 414 F. Supp. 1384, 1392 (S.D. Tex. 1976) (collecting cases).

It is simply too late to claim that the use of such broad and universally understood language would exclude all

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concerns CISA's obligations under the Sales Procedure Agreement; and Article XII states that the Distributor Agreement between CISA and SCP is to remain in full force and effect. The remaining provisions specify the effective date of the Sales Procedure Agreement and link its duration to SCP remaining a CISA distributor (Article VII), and deal with such ancillary matters as that SCP should not be considered as either the agent or a distributor of MMC (Article X); the consent required to amend the agreement (Article XIII); and choice of law and act of God clauses (Articles XIV, XV).

[10] As Chief Judge Seitz observed in *Federated Metals Corp.* v. *United Steelworkers of America*, 648 F.2d 856, 858-859 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981), the same rules of construction apply to arbitration clauses covering only specified portions of an agreement and to those encompassing the entire contract.

statutory claims except those explicitly referred to by the parties. Moreover, the supposed distinction between statutory claims and common law claims makes no sense.[11] In particular, in civil law jurisdictions all laws are codified and, under SCP's suggested rule, all such claims would have to be exhaustively listed in the arbitration agreement.[12] Similarly, the rules, both state and federal, which govern business conduct in the United States, are increasingly statutory, thus further increasing the need, under SCP's proposed standard, for a mechanical listing of any statute which might give rise to a later claim. The Court should not endorse such an unworkable proposal.

Both the District Court and the Court of Appeals analyzed the inclusion of each of SCP's claims within the

[11] SCP cites in support of its proposed rule of construction *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414 (9th Cir. 1984), and *Leyva* v. *Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979). *Marchese*, which is discussed at pages 31 through 33 of Petitioner's Brief, held, based on *Leyva*, that "nonwaivable statutory rights" were not encompassed within the scope of an agreement to arbitrate disputes "arising out of or relating to my account, to transactions with you for me or to this agreement or the breach thereof." 734 F.2d at 416 n.2, 419-421. The alternative holding of *Marchese* appears to be that, with an express agreement to arbitrate such statutory claims, enforcement of the arbitration agreement might be granted. *Id.* at 420.

Leyva held that a narrow arbitration clause providing for arbitration "[s]hould any controversy, dispute, or disagreement arise . . . out of the interpretation or application of the provisions of this Agreement . . ." did not encompass a claim under the Fair Labor Standards Act. 593 F.2d at 861 n.5. The court observed that "contracts which provide for arbitration of contract disputes should not be read to require arbitration of statutory claims absent express provision for such arbitration." *Id.* at 863.

As set forth above, this Court has ruled that statutory claims are within the scope of arbitration clauses materially indistinguishable from the one at issue here, and, to the extent *Marchese* and *Leyva* hold to the contrary, they should be disapproved.

[12] Puerto Rico's legal system is based upon the Spanish Civil Code.

arbitration clause, and both concluded, subject to limited exceptions not challenged here, that SCP's statutory claims were within the scope of the agreement to arbitrate. (*See* PA 9-10; PB 8-11). The consistent decisions of both lower courts on the scope of the arbitration clause should be affirmed by this Court.

A. The Federal Arbitration Act Has Preempted the Dealers' Act of Puerto Rico

Puerto Rico claims that its Law No. 75, the Dealers' Act of Puerto Rico ("Act 75"), is not preempted by federal law. Although Puerto Rico states that it "does not in this brief contest Soler's obligation 'to settle by arbitration' its dispute with Mitsubishi regarding the termination of its dealership" (Brief of Puerto Rico at 21), Puerto Rico attempts to accomplish that goal by separating arbitration agreements into three component parts: (i) an agreement to settle disputes by arbitration, (ii) choice of venue and (iii) choice of law. (*Id.*).[13] Under Puerto Rico's view, only the agreement to arbitrate itself is governed by federal law, leaving actual control of the conduct of that arbitration to the laws of the several states.

Puerto Rico's argument is inconsistent with the express language of §§ 3 and 4 of the Federal Arbitration Act. Section 3 provides:

> "If any suit . . . be brought . . . the court in which such suit is pending . . . shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . ."

Section 4 provides:

[13] MMC does not contend that the Swiss choice of law provision in the agreement bars SCP from asserting in the arbitration proceeding a claim under Act 75, or any other of its statutory claims. In fact, it was MMC which moved to compel arbitration of those claims.

> "A party . . . may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided in such agreement."

Since the Act itself does not allow arbitration provisions to be dissected in the manner proposed by Puerto Rico, its argument should be rejected.

Puerto Rico concedes that the Puerto Rico Supreme Court has interpreted Act 75 as an anti-arbitration provision indistinguishable from the statute struck down by this Court in *Southland*. (Brief of Puerto Rico at 17 n.8). It suggests, however, that the Court ignore that decision because the Puerto Rico Supreme Court "has not had the opportunity to reconsider *Walborg* in light of this Court's decision in *Keating*." (*Id.*).

Puerto Rico's suggestion is meritless, because its legislature has amended Act 75 to incorporate the holding of *Walborg*. Puerto Rico's brief (at 9) omits from its quotation of the legislative history of Act 75 that section of the Report of the Commission of Industry, Commerce and Industrial Promotions of the Commonwealth Senate which clearly states that Act 75 was amended in 1978 precisely "in order to incorporate into the text of Law No. 75 the aforesaid judicial doctrine" established in *Walborg*. A fuller excerpt from the report provides as follows:

> "The [bill] declares those clauses null and void, recognizing the doctrine established by our Supreme Court in the case *Walborg Corporation* v. *Superior Court*, decided on 30 September, 1975 [104 D.P.R. 184].
>
> "Notwithstanding that said case resolved that by express disposition of Article 4, the rights that Law No. 75 confers to distributors are of public order

> and nonwaivable and that the clauses which obligate the distributor to settle his controversies outside of Puerto Rico are null, this measure should be approved in order to incorporate into the text of Law No. 75 the aforesaid judicial doctrine."

Servico Legislativo de Puerto Rico, 8a. Asamblea, 2a. Sesion Ordinaria, Volume 16, 444, 445 (1978) (translation supplied). It is clear that the Puerto Rico legislature intended Act 75 to have precisely the anti-arbitration effect which this Court invalidated in *Southland*.

Moreover, the attempt to confine *Southland* solely to the agreement to arbitrate itself is contradicted by two decisions of this Court not cited by Puerto Rico. In *Prima Paint*, this Court applied the Act to an agreement between a New Jersey corporation and a Maryland corporation which provided that:

> "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association * * *."

388 U.S. at 398. In holding that federal law required that a claim of fraud in the inducement of that contract was to be arbitrated in the forum selected by the parties, this Court stated that:

> "Congress has provided an explicit answer . . . in § 4 of the Act, which provides [that] the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.'"

388 U.S. at 404.

Any doubt that federal law controls all aspects of the arbitration agreement was put to rest by this Court's decision in *Moses H. Cone*, which held:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."

460 U.S. at 24.

The Courts of Appeals have consistently followed the teachings of those decisions. For example, in *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17 (1st Cir. 1978), the First Circuit, relying on *The Bremen* and *Scherk*, held that:

> "The Supreme Court has expressed its strong endorsement of giving full force to the Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and of requiring parties engaged in international commerce to abide by their promises to arbitrate in a particular forum. . . . USM's argument to this court that a hardship will ensue should it be forced to arbitrate in England is precisely the type of contention which should have been resolved prior to signing the arbitration agreement.
>
> "Indeed, if every party who signed an arbitration clause could later come into court and attempt to defeat the clause on the basis of its unfairness or unreasonableness, the advantages attendant on arbitration rather than litigation would be largely lost. A party's right to defeat an arbitration clause for specifically recognized reasons is explicitly protected in the statute. If the clause was the product of fraud, coercion, or such legal or equitable grounds

> which would give rise to revocation of a contract, the clause can be repudiated."

Id. at 20-21 (citations omitted). *See Kroog* v. *Mait*, 712 F.2d 1148, 1150 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3551 (U.S. Jan. 24, 1984) (No. 83-917) (compelling arbitration in either Chicago or New York despite anti-waiver provisions of Wisconsin Uniform Securities Law); *Ledee* v. *Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) (rejecting claim that Act 75 rendered an arbitration agreement unenforceable as against public policy, and compelling a Puerto Rico distributor to proceed to arbitration with an Italian manufacturer in Italy); *Hilti, Inc.* v. *Oldach*, 392 F.2d 368, 373 (1st Cir. 1968) (compelling arbitration in Connecticut of claim under Act 75 by Puerto Rico distributor).

In the closely related context of enforcing choice-of-forum clauses, this Court has emphasized the importance of honoring the contractual choice of the parties. In *The Bremen*, the parties to the contract were corporations with their principal places of business in Texas and Germany. They had agreed to resolve all disputes before a specified court in Great Britain. 407 U.S. at 2. In holding that an attempt by Zapata to litigate in the United States District Court for the Northern District of Florida was foreclosed by that contractual choice of forum, this Court stated:

> "[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved

> that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."

Id. at 15.

As this Court has observed, "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk*, 417 U.S. at 519 (footnote omitted). *See AVC Nederland B.V.* v. *Atrium Investment Partnership*, 740 F.2d 148, 155-159 (2d Cir. 1984). Puerto Rico's attempt to avoid the federal rule approving and enforcing forum selection clauses, a rule which has been applied to arbitration clauses, has, therefore, already been rejected by this Court.

To allow states to bar arbitration in the specific forum selected by the parties would frustrate both the language of the Act and clear congressional intent. As this Court held in *Southland*:

> "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."

— U.S. at —, 104 S. Ct. at 861 (footnote omitted). Thus, the states may not deny or abridge the federally guaranteed right to enforcement of arbitration agreements.

Puerto Rico's argument also is refuted by the terms of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan, 4 U.S.T. 2063 (1953).[14]

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[14] Article VII(1) of the Convention states that such treaties shall continue in force and effect.

Article IV, § 2 of that treaty provides as follows:

> "Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party."

Puerto Rico's suggestion, that its legislature may decree unenforceable any arbitration agreement which provides for arbitration outside of Puerto Rico, is in direct conflict with the treaty.

To the extent that Puerto Rico law would require this arbitration to be conducted only in Puerto Rico, it is preempted by contrary federal law.

B. SCP's Claims Under the Federal Dealers' Day In Court Act Were Properly Submitted to Arbitration

SCP and NADA contend that claims under the federal Dealers' Day In Court Act, 15 U.S.C. §§ 1221-1225 ("Dealers' Act"), are exempt from the Federal Arbitration Act. (Respondent's Brief at 21 n.12; Brief of NADA at *passim*). That argument confuses the creation of a substantive right with the very different issue of whether Congress proscribed voluntary agreements to select arbitration as a means of enforcing that right.

The purpose of the Dealers' Act was to provide a narrowly defined class, automobile dealers, with substantive protection by implying into each dealership contract an obligation on the part of the manufacturer "to act in good

faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers." H.R. Rep. No. 2850, 84th Cong., 2d Sess. 1 (1956). Finding that because of the "express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer" (H.R. Rep. at 4),[15] Congress provided that, as a matter of federal law, an obligation of good faith would be implied in dealership agreements "irrespective of the contract terms." *Id.* at 5.

There is nothing in the Dealers' Act which relates to arbitration at all, and neither SCP nor NADA claims that Congress has explicitly prohibited the arbitration of claims under that statute. Rather, they rely on a fragment of the legislative history in their effort to expand the *American Safety* rule.

The legislative history, however, fails to show that it was Congress's intent to prohibit an agreement to submit such claims to arbitration. Indeed, to the extent it speaks to this point, the legislative history reflects that the issue was left open by Congress. The Senate Report notes that "[i]ntracompany procedures have been established by various automobile manufacturers for the purpose of reviewing dealer grievances . . . in an effort to provide dealers with a tribunal for hearing their grievances." S. Rep. No. 2073, 84th Cong., 2d Sess. 6 (1956). The Senate Report rejected such remedies as inadequate, "[h]owever laudable such measures may be in principle," because of the "obvious

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[15] At the time the statute was enacted, Congress recognized that dealer contracts had been written with "a power of termination at will here so unmistakably expressed" that courts were unable to "assert that a limitation of good faith was anything the parties had in mind." *Bushwick-Decatur Motors, Inc.* v. *Ford Motor Co.*, 116 F.2d 675, 677 (2d Cir. 1940).

difficulty of obtaining an impartial decision of a dealer's case on the merits from a board appointed and paid by and accountable to the manufacturer." *Id.* Congress did not thereby indicate that resolution of Dealers' Act claims by a truly impartial arbitral process was precluded.

In the absence of any supportive expression of congressional intent, NADA instead relies upon its own proposition that permitting a dealer to waive his right to federal court litigation of his Dealers' Act claims would vitiate the effectiveness of the remedy provided by that statute. That unsupported proposition is rooted in the same suspicion and hostility to arbitration which Congress emphatically rejected by passing the Federal Arbitration Act. NADA's brief makes the point in blunt fashion:

> "It is not simply that an arbitration clause would move the claims from one forum to another. *It is that the quality of the forum changes* in a manner inimical to the statute and to the group Congress wished to protect—the dealers. As the courts have pointed out, *commercial arbitrators are inappropriate persons* to consider matters affecting the public interest. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968). The *objectivity* that the federal court system provides to litigants, as envisaged by the protective nature of the Dealers' Day In Court Act, would be lost. *Marchese* v. *Shearson Hayden Stone, Inc.*, 734 F.2d 414, 421 (9th Cir. 1984)."

(Brief of NADA at 9; emphases added).

NADA's expression of suspicion regarding the quality and fairness of the arbitral process is, of course, no basis for concluding that Congress intended to preclude arbitration of Dealers' Act claims. More significantly, acceptance

of NADA's view as a rationale for exempting Dealers' Act claims from arbitration would represent a reversion to the antipathy towards arbitration which Congress and this Court have explicitly rejected.

Neither respondent nor any of its *amici* has made any showing that the clear and unambiguous mandate of the Act, that all agreements to arbitrate be enforced, has been modified by Congress with respect to any of the statutory schemes at issue. This Court should reject the implicit invitation to embark upon the inherently legislative task of determining the appropriate balance to strike among the federal statutory schemes which Congress has enacted. Under our constitutional system that task is reserved exclusively to Congress, not the judiciary.

IV.

Arbitration of All Claims Is Compelled by the Convention

The brief of the United States recognizes the force which the Convention has in this case:

> "We stress at the outset our belief that under the Convention Contracting States must, with limited exceptions, enforce agreements to arbitrate international disputes. . . . We fully support these purposes, which are of considerable importance to United States businesses engaged in international commerce."

(Brief of United States at 24). Nevertheless, the United States goes on to argue that the mandate of the Convention should be ignored on the ground that antitrust claims are not "a subject matter capable of settlement by arbitration" within the terms of Convention Article II(1). (Brief of United States at 25; *see* Respondent's Brief at 36-38). That

argument is inconsistent with the Convention's spirit and legislative history.

The purpose of the Convention was explained by this Court in *Scherk*:

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

417 U.S. at 520 n.15 (citations omitted).

Existing case law under the Convention is uniform in holding that "a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis." *Parsons & Whittemore Overseas Co.* v. *Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). *See Waterside Ocean Navigation Co.* v. *Int'l Navigation, Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984); *Ledee*, 684 F.2d at 186-187; *I.T.A.D. Associates, Inc.* v. *Podar Brothers*, 636 F.2d 75, 77 (4th Cir. 1981). Because the Convention "call[s] for a narrower view of non-arbitrability in the international than the domestic context," *Parsons & Whittemore*, 508 F.2d at 974,[16] enforcement of an arbitration agreement will be denied "only where enforcement would violate the forum state's most basic notions of morality and justice." *Fotochrome, Inc.* v. *Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975).

[16] As the United States points out:

> "Claims that are nonarbitrable in a domestic context would not automatically be nonarbitrable under the Convention. This Court's decision in *Scherk* makes that clear, even apart from the requirements of the Convention."

(Brief of United States at 28 n.42).

These principles have been applied to the initial issue of whether to enforce an arbitration agreement as well as to the confirmation of arbitral awards.[17] The courts have unequivocally stated that the "policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate" because the "signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate" and "[n]either the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption." *Rhone Mediterranee Compagnia* v. *Lauro*, 712 F.2d 50, 54 (3d Cir. 1983). *See* Petitioner's Brief at 34-38.

The legislative history of United States accession to the Convention confirms that this nation intended that the Convention would apply to all commercial disputes arising in international commerce, while leaving certain domestic and noncommercial matters unaffected. In his testimony before the Senate Committee on Foreign Relations, Mr.

[17] Indeed, as pointed out by MMC and by the United States, the absence of an express linkage between Convention Article II, concerning referral to arbitration, and Article V, concerning enforcement, is a product of inelegant draftsmanship which is easily reconciled. (Petitioner's Brief at 36 n.18; Brief of United States at 26 n.39). *See* G.W. Haight, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE 28 (1958). One leading commentator states that it is "generally accepted" that the separate subject matter provision in Article V is "superfluous as the question of nonarbitrable subject matter is deemed to form a part of the general concept of public policy." A. Jan van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958 368 (1981).

Richard D. Kearney, representing the Office of the Legal Advisor of the Department of State, explained why the United States was adopting the Convention's optional "commercial matter only" reservation, which limits applicability of the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Convention Article I(3). Mr. Kearney explained that:

> "The Convention applies to . . . arbitral awards without any limitation as to the nature of the relationship that gave rise to the award. It might, for example, be a question of family status. . . .
> [T]he United States will file such a declaration because our purpose in adhering to the Convention is for the beneficial effects it will produce in foreign commerce of the United States and not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 states of the Union."

S. Rep. No. 702, 91st Cong., 2d Sess. 6 (1970). That view—that the Convention would apply to all commercial disputes arising in international commerce, a subject not traditionally within the jurisdiction of the states of the Union, and leave unaffected non-commercial matters—is also found in the memorandum of the State Department forwarded to the Senate. The memorandum provides:

> "Agreements to submit existing disputes (submissions) and agreements to submit disputes that may arise in the future (compromissary clauses) are covered. The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting title to real property are not arbitrable."

S. Exec. Doc. E, 90th Cong., 2d Sess. 18-19 (1968). Thus, it was the declared intention of the United States to include commercial disputes, and to exclude such matters as "a question of family status" or "disputes affecting title to real property." As was held in *Island Territory of Curacao* v. *Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y.), *aff'd*, 498 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974): "We may logically speculate that [the commercial limitation] was to exclude matrimonial and other domestic relations awards, political awards, and the like."

The United States believes that, under the Convention, "the category of subject matter determined to be non-arbitrable should be quite limited." (Brief of United States at 28; footnote omitted).[18] For example, in the domestic context, this Court has held that claims for employment discrimination under Title VII, *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51-57 (1974), for violation of the minimum wage provisions of the Fair Labor Standards Act of 1938, *see Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739-741 (1981), or for deprivation of constitutional guarantees under the Civil Rights Act, 42 U.S.C. § 1983, *McDonald* v. *City of West Branch*, — U.S. —, 104 S. Ct. 1799, 1803 (1984), are not arbitrable. Each of those claims is based upon a statute designed "to provide minimum substantive guarantees to

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[18] In the omitted footnote, Brief of United States at 28 n.42, the United States makes the observation that, even apart from the Convention, this Court's decision in *Scherk* makes it clear that claims that would be nonarbitrable in the domestic context would not necessarily be nonarbitrable in an international setting.

individual[s]," *see Barrentine*, 450 U.S. at 737, and might not be considered "commercial" under the Convention.

By contrast, in *Scherk* this Court held that claims under the securities laws arising in an international context were a subject capable of settlement by arbitration, even though Congress had provided that similar domestic claims would not be arbitrable. There is no rational basis upon which the securities laws may be distinguished from the antitrust laws for purposes of applying the Convention. To hold antitrust claims exempt from the Convention would constitute a reversal of this Court's recognition in *Scherk* that:

> "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."

417 U.S. at 516.

SCP and the United States attempt to distinguish *Scherk*, as did the court below, by arguing that the securities laws express a less important public policy than do the antitrust laws. As set forth in Petitioner's Brief, a court's evaluation of the importance of the policy motivating congressional enactment of a statute cannot be the test of arbitrability. Rather, as in the domestic context, that choice belongs to Congress alone. Moreover, as this Court's prior holdings have made clear, the attempt of SCP and the United States to relegate the securities laws to a secondary position is unfounded. *See United States* v. *Naftalin*, 441 U.S. 768, 775-776 (1979).

Refusal to enforce the arbitration agreement will result in the "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" warned

of in *Scherk*, and will likely "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S. at 517-518.[19] For example, instead of commencing its action in the District Court, MMC could have sought an order from a court in Japan ordering SCP to honor its promise to resolve all disputes "in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." (JA 53).[20] If the decision below were affirmed, the result would be to encourage such forum shopping, resulting in unseemly and unnecessary conflicts between jurisdictions.

A refusal to order arbitration would, in the language of *Scherk*, "not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts.'" 417 U.S. at 519 (citation omitted). It is not that the antitrust laws are more or less "parochial" than the securities laws, as SCP seems to suggest. Rather, it is SCP's insistence on adjudication only in our courts that is condemned as parochial and unnecessarily "demean[ing to] the standards of justice elsewhere in the world." *Id.* at 517 n.11.

Thus, the clear language of the Convention and this Court's decision in *Scherk* mandate that all of SCP's counterclaims be arbitrated.

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[19] Such refusal may also have a chilling effect on American attempts to broaden trade with other nations, many of which have a strong commitment to voluntary settlement of disputes and provide for arbitration, not litigation, as the forum of last resort.

[20] Under American requirements of due process, SCP would be subject to the personal jurisdiction of a Japanese court for purposes of enforcing the arbitration agreement. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977).

Conclusion

The judgment of the Court of Appeals, insofar as it reversed the judgment of the District Court, should be reversed with directions that the judgment of the District Court be reinstated, and should otherwise be affirmed.

February 12, 1985

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REPLY BRIEF

NOS. 83-1569 and 83-1733

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MITSUBISHI MOTORS CORPORATION,
Petitioner and Cross-Respondent,

—against—

SOLER CHRYSLER-PLYMOUTH, INC.,
Respondent and Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF OF CROSS-PETITIONER

Respondent and Cross-Petitioner Soler Chrysler-Plymouth Inc. ("Soler") submits this reply brief in response to the Brief of Cross-Respondent Mitsubishi Motors Corporation ("Mitsubishi") and in further support of its cross-petition (No. 83-1733).

Introduction

The most controversial issue raised by the within cross-petition is not whether antitrust claims can or cannot be arbitrated (for more than 15 years the courts have unanimously agreed they cannot) or whether the reasoning of *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) has any application to a situation where a foreign manufacturer has chosen to expand its sales operation directly into the American marketplace (Soler submits that the very language of *Scherk* dictates that it does not), but the issue of what procedure a court should follow when faced with nonarbitrable claims that are joined with arbitrable claims.

The conflict between the various circuits with respect to this issue; *Compare Miley* v. *Oppenheimer & Co. Inc.*, 637 F.2d 318, 335 (5th Cir. 1981); (in order to preserve exclusive federal court jurisdiction of a claim, arbitration will not be permitted where arbitrable and non-arbitrable issues are "intertwined"), and *Dickinson* v. *Heinold Securities, Inc.*, 661 F.2d 638, 644 (7th Cir. 1981); (a court need not refuse to order arbitration to preserve exclusive federal court jurisdiction of a claim, exclusive jurisdiction can be preserved by staying arbitration and requiring prior judicial resolution of the nonarbitrable claim); was thrown into complete confusion by the suggestion of the First Circuit Court of Appeals herein that an arbitrator's decision on the issue of whether Mitsubishi had "good cause" to terminate Soler's franchise might obviate the need to ever hear Soler's antitrust claims.

It is submitted that not only would the procedure suggested by the Court of Appeals infringe upon exclusive federal court antitrust jurisdiction, it would deprive Soler of its constitutional right to a jury trial of its antitrust claims. *Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500, 504 (1959).

In addition, for the reasons set forth in Soler's initial brief, it is clear that the Court of Appeals erred in determining that the statutory claims asserted by Soler fell within the scope of the limited arbitration clause herein. Mitsubishi, never really coming to grips with this issue in its brief, is reduced to arguing that the arbitration clause, which is labeled "Arbitration of Certain Matters," and is confined to specifically enumerated clauses contained in the Sales Procedure Agreement, is not, in fact, a narrow arbitration clause, but is really a broad arbitration clause, and is not limited to arbitration of "certain matters," as it expressly states, but should be read to include arbitration of "all matters."

Finally, lest there be any doubt that Congress did not intend antitrust claims be arbitrated, we respectfully refer this Court's attention to the well settled maxim of statutory construction that Congress is presumed to be aware of a judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). By reason of the fact that in both 1980 and 1982 Congress amended the very provision which authorizes private antitrust suits, 15 U.S.C. 15, and yet retained the remainder of the statute which has been interpreted as requiring exclusive federal court jurisdiction of antitrust claims, it is submitted that Congress, at the very least, implicitly expressed its approval of the doctrine that antitrust claims are of a character inappropriate for arbitration.

ARGUMENT

POINT I

An arbitrator's decision may not be permitted to render unnecessary a jury trial of an antitrust claim.

As set forth in Soler's intial brief submitted on this cross-petition, in remanding this case to the District Court the Court of Appeals suggested that if an arbitrator found that Mitsubishi had "good cause" to terminate Soler's franchise it might be unnecessary to ever hear Soler's antitrust claims. In addition to pointing out that this suggestion completely ignored the heart of the dispute between the parties, i.e., whether the refusal to permit transshipment of the disputed vehicles was unlawful, Soler also argued that to permit an arbitrator to render moot an antitrust claim would infringe on exclusive federal court antitrust jurisdiction.

Mitsubishi, apparently convinced by its own argument that exclusive federal court antitrust jurisdiction does not exist, has chosen to completely ignore this issue in its brief. The fact is, however, that while various courts have disagreed on the proper method of preserving exclusive federal court jurisdiction of certain claims, they have agreed on the importance of preventing an arbitrator's decision from precluding a party from having his day in court on non-arbitrable claims. *Miley* v. *Oppenheimer & Co. Inc.*, 637 F.2d 318, 335 (5th Cir. 1981), *Dickinson* v. *Heinhold Securities Inc.*, 661 F.2d 638, 644 (7th Cir. 1981); *Liskey* v. *Oppenheimer & Co. Inc.*, 717 F.2d 314, (6th Cir. 1983); *Lake Communications Inc.* v. *ICC Corporation*, 738 F.2d 1473 (9th Cir. 1984); *Byrd* v. *Dean Witter Reynolds Inc.*, 726 F.2d 552 (9th Cir. 1984); *Cunningham* v. *Dean Witter Reynolds Inc.*, 550 F.Supp. 578 (D.Cal. 1982);

Speck v. *Oppenheimer & Co. Inc.*, 583 F.Supp. 325 (D.Mo. 1984); *Big Apple Cookie Company* v. *Springwater Cookie Company*, 517 F.Supp. 367 (D.Ohio 1981).

In *Miley* v. *Oppenheimer & Co. Inc.*, 637 F.2d 318 (5th Cir. 1981) the court was faced with a federal securities claim and a common law claim for breach of fiduciary duty which were based on essentially the same operative facts. In order to promote efficiency and to preserve exclusive federal court jurisdiction of the federal securities claim, the Court, applying the doctrine of "intertwining," refused to permit arbitration of the common law claim and ordered that all claims be tried in federal court. In so doing the Court pointed out that allowing the common law claim to proceed to arbitration "could essentially rob the federal court of its exclusive jurisdiction." 637 F.2d at 336.

The approach taken by the Fifth Circuit, in *Miley*, however, has been criticized by other courts. These courts reason that by refusing to permit arbitration of agreed upon disputes, the mandate of the Federal Arbitration Act is improperly being ignored. These courts suggest that a bifurcated approach, whereby arbitration is stayed pending judicial resolution of the non-arbitrable claims, would best harmonize the mandate of the Federal Arbitration Act that agreed upon claims be arbitrated and the doctrine that certain claims must exclusively be heard in federal court. *See Dickinson* v. *Heinold Securities Inc.*, 661 F.2d 638, 644 (7th Cir. 1981):

> Where the non-arbitrable issues substantially permeate the entire case and make it difficult to separate out the arbitrable issues, the district court has discretion to stay arbitration pending a judicial resolution of the nonarbitrable claims. [Citations omitted]. *By controlling the order of the two adju-*

> *dications, a procedure certainly within the power of the district court,* [*citations omitted*] *the district court can preserve its full authority to decide non-arbitrable issues without any collateral estoppel consequences from a prior arbitration.* (emphasis added)

In *Lake Communications Inc.* v. *ICC Corporation* 738 F.2d 1473 (9th Cir. 1984), the Ninth Circuit relying on this Court's opinion in *McDonald* v. *City of West Branch,* —— U.S. ——, 104 S.Ct. 1799 (1984), took a similar, although slightly different approach to this problem. The court there permitted the arbitration and judicial proceedings to proceed simultaneously, but stated that in order to insure the court's exclusive jurisdiction over antitrust claims it might be necessary to refuse to give *res judicata* or collateral estoppel effect to the arbitrator's decision. The court stated:

> [I]f . . . the arbitrators were to decide issues critical to the antitrust claims, the court would not be compelled to accept the arbitrator's finding on those issues. 738 F.2d at 1478.

It is submitted that regardless of which of the foregoing approaches best harmonizes the competing policy considerations behind the Federal Arbitration Act and the doctrine that certain claims should exclusively be heard in a federal court, the decision of the First Circuit Court of Appeals below, suggesting that an arbitrator's decision might obviate the need to ever hear an antitrust claim is clearly erroneous.

This is demonstrated not only because giving such effect to an arbitrator's decision would infringe on exclusive federal court antitrust jurisdiction, but even more fundamentally, it would deprive Soler of its constitutional right to have a jury decide its antitrust claim. *See Beacon Theatres Inc.* v. *Westover,* 359 U.S. 500, 504 (1959) where this Court held that the right to a jury trial of an antitrust claim is "an essential part of the congressional plan for making competition rather than monopoly the rule of trade."

In *Beacon Theatres* this Court was faced with a dispute strikingly similar to the dispute at bar, except that rather than a party claiming it would be denied its right to a jury trial by prior submission of factual issues to an arbitrator, the petitioner therein contended that it would be denied its right to a jury trial by prior determination of equitable issues by the court. This Court agreed with the petitioner and held that where legal and equitable issues are presented in a single case, the constitutional right to a jury trial could only be protected by requiring that the legal issues be submitted to the jury prior to the determination of the equitable issues.

The same conclusion is called for herein. Soler has never agreed to arbitrate antitrust claims with Mitsubishi and has demanded a jury trial of those claims. (JA 76). Soler cannot therefore be deprived of its right to a jury trial, as suggested by the Court of Appeals, by an arbitrator's determination that Mitsubishi had "good cause" to terminate Soler's distributorship. It is therefore respectfully requested that this Court reverse the decision of the Court of Appeals and remand this case with proper instructions.

POINT II

Well settled principles of statutory construction mandate a determination that antitrust claims may not be arbitrated.

Mitsubishi's challenge to the well established doctrine that antitrust claims are of a character inappropriate for arbitration is premised on its contention that there is "no explicit or implicit evidence that Congress intended to exclude antitrust claims" from arbitration. (See page 9 of the Brief of Cross-Respondent). Since, however, Mitsubishi's premise is mistaken, the rest of its argument must necessarily fall.

It is a well settled maxim of statutory construction that Congress is presumed to know the law, *Director, Office of Workers Compensation Programs* v. *Perini North River Associates*, —— U.S. ——, 103 S.Ct. 634, 649 (1983), *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), and that where Congress re-enacts a statute without change it adopts the judicial or administrative interpretation accorded that statute. *See Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978):

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975); *NLRB* v. *Gullet Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U.S. 140, 147 (1920); 2A C.Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). *So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had*

> *knowledge of the interpretation given to the incorporated law* at least insofar as it affects the new statute. (emphasis added)

Applying this rule of statutory construction to the instant case, it is clear that the argument by Mitsubishi is wholly without merit. This is demonstrated by the fact that in enacting the "Antitrust Procedural Improvements Act of 1980," H.R. REP. NO. 96, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2716, and "Antitrust Reciprocity" in 1982, H.R. REP. NO. 97, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. CODE CONG. & AD. NEWS 3495, Congress amended 15 U.S.C. 15, the very provision that authorizes private antitrust suits, and yet left intact the remainder of the statute which has been judicially interpreted as mandating exclusive federal court antitrust jurisdiction.

If as Mitsubishi so strenuously argues, Congress disapproves of the doctrine that antitrust claims are of a character inappropriate for arbitration, why then didn't Congress remedy the situation when it enacted this legislation? This question is especially appropriate in view of the fact that a number of these recent amendments were expressly made in response to judicial decisions. For example, the "Antitrust Reciprocity" amendment was "intended to be a legislative response to the Supreme Court's opinion in *Pfizer, et al. Government of India, et al.* ("Pfizer"), 434 U.S. 308 (1978)," H.R. REP. 97, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. CODE CONG. & AD. NEWS 3495, and one of the amendments that was included in the "Antitrust Procedural Improvements Act of 1980" was intended to adopt "the interpretation of the Antitrust Civil Process Act followed in a recent Second Circuit Court of Appeals decision, *United States* v. *GAF Corporation*,

596 F.2d 10 (2d Cir. 1979)," H.R. REP. NO. 96, 96th Cong., 2d Sess., *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2716.

It is submitted that the foregoing demonstrates, at the very least, that Congress implicitly approves of the doctrine that antitrust laws are of a character inappropriate for arbitration. Thus, the argument of Mitsubishi, while technically "well crafted," lacks any persuasive force and should be rejected by this Court.

CONCLUSION

The decision of the Court of Appeals, insofar as it determined that Soler's statutory claims fell within the scope of the arbitration clause herein, was erroneous. The Court of Appeals also erred in its instructions remanding the case to the District Court. It is therefore submitted that the judgment of the Court of Appeals, insofar as it relates to these issues, be reversed, and the case remanded with proper instructions.

Respectfully submitted,

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